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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1283.~~ 904

THE WESTERN AIR LINE CONSTRUCTION COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM A. McGILLIS AND JAMES HOGAN, COPARTNERS, &c.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 24, 1887.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Walter Q. Gresham, judge of the circuit court of the United States for the seventh judicial circuit, on Thursday, the twenty-eighth day of October, in the adjourned October term of said court, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and eleventh year.

WM. H. BRADLEY, *Clerk.*

WILLIAM A. MCGILLIS and JAMES HOGAN, Copartners Doing Business Under the Firm Name and Style of McGillis and Co., Who Sue for the Use of John S. Cooper, Trustee,

vs.

WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the fourth day of May, 1883, there were filed in said clerk's office a bond for costs and a transcript of record from the circuit court of Kankakee county, Illinois, in said above-entitled cause; which said bond and transcript are, respectively, in the words and figures following, to wit:

2 *Bond for Costs.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Circuit Court. May Term, A. D. 1883. In Law.

WM. A. MCGILLIS *et al.*

vs.

WESTERN AIR LINE *Transportation* Co.

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the defendant of any costs ordered or adjudged to be paid by it hereby agree and stipulate that execution may issue against my property for any costs taxed against it.

Dated this — day of May, A. D. 1883.

H. K. WHEELER.

(Endorsed:) Filed May 4, A. D. 1883. Wm. H. Bradley, clerk.

1—1283

3 *Transcript.*

UNITED STATES OF AMERICA, } 88:
State of Illinois, Kankakee County, }

Pleas at a term of the circuit court within and for the county of Kankakee and State of Illinois, begun and held at the court-house, in the city of Kankakee, in said county, on the first Tuesday (the same being the 3rd day) of April, in the year of our Lord one thousand eight hundred and eighty-three.

Present: Hon. O. T. Reeves, one of the judges of the 11th judicial circuit of said State of Illinois; Daniel H. Paddock, attorney of said Kankakee county; George R. Letournean, sheriff of said Kankakee county; J. Frank Leonard, clerk of the circuit court of said Kankakee county.

WILLIAM A. McGILLIS and JAMES HOGAN, for the Use of John S. Cooper, Trustee,
vs.
WESTERN AIR LINE CONSTRUCTION COMPANY. } 7065.

Attachment.

And now comes the plaintiff, by T. P. Bonfield, his attorney, and the defendant comes, by H. K. Wheeler, its attorney; and said defendant presents to the court its petition and bond for
4 the removal of this cause from this court to the circuit court of the United States for the northern district of Illinois.

And the court, being fully advised, approves said bond and orders that this cause be removed from this court to said circuit court of the United States, according to the prayer of said petition. Said parties agree that the original papers filed in this court be transmitted to said circuit court of the United States in lieu of certified copies.

STATE OF ILLINOIS, } 88:
Kankakee County, }

I, J. Frank Leonard, clerk of the circuit court in and for said county, in the State aforesaid, do hereby certify that the foregoing is a true copy of the record of court had in a certain cause lately pending in said court, on the law side thereof, wherein William A. McGillis and James Hogan, for the use of John S. Cooper, trustee, were plaintiffs and Western Air Line Construction Company was defendant, and that the papers herewith transmitted and numbered from one to five, inclusive, are all the papers on file forming any part of the record of said cause in said court.

I further certify that I am the custodian of the records and files of said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at the city of Kankakee, this 3rd day of May, A. D. 1883.

[SEAL.] J. FRANK LEONARD, *Clerk.*

(Endorsed:) Filed May 4, 1883. W. H. Bradley, clerk.

5 On the same day, to wit, on the fourth day of May, 1883, there was filed in said clerk's office a declaration from the circuit court of Kankakee county, Illinois, in said entitled cause; which said declaration is in the words and figures following, to wit:

Narr.

STATE OF ILLINOIS, } ss:
Kankakee County, }

In the Circuit Court of Kankakee County, to the April Term, A. D. 1883.

William A. McGillis and James Hogan, copartners doing business under the firm name and style of McGillis & Co., plaintiffs in this suit (who sue for the use of John S. Cooper, trustee), by T. P. Bonfield and Jno. S. Cooper, their attorneys, complain of Western Air Line Construction Company, a corporation, defendant in this suit, summoned, etc., of a plea of trespass on the case upon promises—

For that whereas heretofore, to wit, on the 6th day of September, A. D. 1882, at, to wit, the county of Kankakee aforesaid, by a certain agreement then and there made between said plaintiffs, as such copartners as aforesaid, —, the said plaintiffs agreed to and with the said defendant to do and complete the grubbing, clearing, grading, and timber-work and furnish the necessary materials therefor to complete the road-bed of a certain railroad, known as the Indiana, Illinois & Iowa railroad, and upon and of
6 that portion of said railroad designated by said defendant as sections numbered from one to forty-six, inclusive, of the Indiana Division; which said portion of said railroad was then and there in length, to wit, forty-six miles, and was then and there being built by said defendant; and the said plaintiffs then and there promised and agreed to and with the said defendant to also lay, line, surface, and *bill* the track of said portion of said railroad, and to commence work upon said portion of said railroad within ten days after said Indiana, Illinois and Iowa Railroad Company should have acquired the title to the land for the right of way for said portion of said railroad, and to do said work and furnish said materials in accordance with certain conditions and specifications, and to do and furnish the same and complete the same on or before the first of January, A. D. 1883, and also to do said work and furnish said materials in accordance with said agreement and said conditions and specifications and under the direction and to the satisfaction of the chief engineer and his assistants of said defendant; and it was also then and there agreed between the said plaintiffs, as such co-

partners as aforesaid, and said defendant that it, the said defendant, would make monthly payments to said plaintiffs for their said work to be done and materials to be furnished as aforesaid by said plaintiffs at and after the rate of 20 dollars per acre for clearing, 5 dollars per 100 feet for grubbing, 20 cents per cubic yard for earthwork, 27.50 dollars per thousand feet, board measure, for timber and planks in foundations, cattle guards, sluices, bridge abutments, trestle-work, piers, and culverts, and for planks in crossings at and after the rate of 27 & $\frac{50}{100}$ dollars per thousand feet, board measure; for piles, per lineal foot, including driving the same, at and after the rate of 30 cents per lineal foot; for wrought and cast iron at and after the rate of 6 cents per pound; for
7 spikes, per pound, six cents, and for lining, surfacing, and filling the track at and after the rate of 400 dollars per lineal mile; and it was then and there further agreed by said plaintiffs and said defendant that said defendant would and should pay to said plaintiffs at and after the rate of ninety per centum monthly for said work which should be done by said plaintiffs and for said materials which should so be furnished by them as aforesaid, as said work should progress, upon the certificate or certificates of the engineer of said defendant that such work had been done; and it was then and there further agreed on the part of said defendant to and with said plaintiffs that said engineer and chief engineer and his assistants of said defendant—that they should and would justly and fairly supervise the said work so to be done by said plaintiffs, and, if so done, to be satisfied therewith, and that said engineer would and should give to said plaintiffs, on, to wit, the first of every month thereafter, a certificate in writing of the said work done and materials furnished by said plaintiffs during the next previous and preceding month, and that it, the said defendant, would forthwith pay to said plaintiffs ninety per centum of the value of said work done and materials furnished during such previous month according to the prices therefor as aforesaid and so as aforesaid certified in writing by the engineer of said defendant; and it was then and there further agreed by said defendant that when said work should be fully done and said materials entirely furnished by said plaintiffs under said agreement that said engineer of said defendant should certify the same in writing, and that within ninety days thereafter said defendant would pay the said and remaining ten per centum of the value of said work and materials so as aforesaid previously deducted and withheld by said defendant during the progress of said work;
and the said agreement being so made, afterwards, to wit, on
8 the day and year first aforesaid, at, to wit, the county of Kankakee aforesaid, in consideration thereof, and that the said plaintiffs, at the special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant to perform and fulfil the said agreement in all things on the said plaintiffs' part and behalf to be performed and fulfilled, it, the said defendant, undertook and then and there faithfully promised the said plaintiffs to perform and fulfil the said agreement in all things on the said defendant's part and behalf to be performed and

fulfilled, and although the said plaintiffs have always from the time of the making of the said agreement performed and fulfilled all things on their part and behalf in the said agreement to be performed and fulfilled, and afterwards, to wit, on the day and year aforesaid, and at, to wit, the county aforesaid, did enter upon and commence the said work and for that purpose did procure and find all materials and labor necessary for performing the same, and did the same in part, to wit, did the work and furnished the materials necessary and requisite to complete the road-bed of a portion of said railroad for and throughout the distance and length of, to wit, forty-five miles, and there did the said work and furnished said materials on said part of said portion of said railroad for the said clearing, grubbing, earth-work, timber, and planks in foundations, cattle guards, sluices, bridge abutments, trestle-work, piers, culverts, and crossings, and furnished and drove the piles and furnished and did the work upon the cast and wrought iron under and in accordance with the terms of said agreement; and afterwards, to wit, on the first day of November, 1882, at, to wit, the county aforesaid, the said plaintiffs applied to said engineer of said defendant for a certificate in writing of the work then and there done and materials furnished therefor by said plaintiffs under said agreement and in accordance there-
9 with, which said plaintiffs allege then and there amounted, at and after the rates and prices so fixed by said agreement, to a large sum, to wit, the sum of fifty-five thousand dollars; yet the said engineer of said defendant, fraudulently and corruptly conniving with said defendant, and said engineer, contriving and conspiring with said defendant how to injure and defraud the plaintiffs in the premises, fraudulently refused to give the said plaintiffs a certificate in writing for said work which had been done and materials furnished therefor during the next previous and preceding month, and which so, as aforesaid, amounted to said sum, to wit, the sum of fifty-five thousand dollars, at and after the rate provided by the terms of said agreement; but, on the contrary thereof, said engineer, afterwards, to wit, on the 14th of November, 1882, at, to wit, the county aforesaid — the said engineer, fraudulently and corruptly and conniving with said defendant, gave said plaintiffs a certificate in writing for only the sum of, to wit, 10,975 & $\frac{32}{100}$ dollars, and then and there, fraudulently colluding and conniving with said defendant, refused to give to said plaintiffs a certificate in writing for any further or greater sum, of all of which said defendant then and there had notice; and afterwards, to wit, on the day and year last aforesaid, and at, to wit, the county aforesaid, the said plaintiffs demanded that said defendant should procure said certificate in writing from its said engineer certifying the amount due to said plaintiffs for said work done and materials furnished during said previous month of October, 1882, under the terms of said agreement and at and after the said rates provided by said agreement, and to pay ninety per centum of the amount thereof; but said defendant, fraudulently and contriving how to injure and defraud the plaintiffs in the premises, wrongfully refused to procure from its said engineer a certifi-
10 cate in writing of the amount of work done and the materials

furnished as aforesaid by said plaintiffs during the said previous month of October, and then and there wrongfully refused to pay to the said plaintiffs the value of said work done and materials furnished by said plaintiffs during said month of October at and after the rate provided by said agreement, to wit, ninety per centum of the said sum of fifty-five thousand dollars, of all of which said premises the defendant had notice, to wit, at the county aforesaid; yet the said plaintiffs in fact say that the said defendant, contriving and wrongfully intending to injure the said plaintiffs, did not nor would perform its said agreement nor its said promises and undertaking, but thereby craftily and subtly deceived the said plaintiffs in this, to wit, that the said plaintiffs did not nor would procure said certificate in writing from its said engineers for the value of the said work so done and materials so furnished as aforesaid, at and after the rates therefor as provided, during said month of October by said plaintiffs, and said defendant did not nor would pay said plaintiffs said 90 per centum of said value of said work and materials; but, on the contrary thereof, hath hitherto wholly neglected and refused so to do, to wit, on the 14th day of November, 1882, at, to wit, the county aforesaid; and the said defendant, further disregarding the said agreement and its said promises and undertaking, afterwards, to wit, on the day and year last aforesaid, and at, to wit, the county aforesaid, did not nor would permit or suffer the said plaintiffs to proceed to complete the said work and furnish said remaining materials, and then and there would wholly hinder and prevented them from so doing, and then and there wrongfully discharged the said plaintiffs from any further performance or completion of their said agreement and promise and undertaking.

Whereby the said plaintiffs have lost and been deprived of
11 the profits and advantages which they otherwise might and would have derived and acquired from the completion of the said work, and from furnishing the necessary materials for so completing the same, to wit, at the county of Kankakee aforesaid.

And whereas, also, heretofore, to wit, on the sixth day of September, A. D. 1882, at, to wit, the county of Kankakee and State of Illinois aforesaid, by a certain agreement then and there made between the said plaintiffs as such copartners and the said defendant, the said plaintiffs agreed to construct and in every respect complete the grubbing and clearing, grading, and timber-work, including the furnishing of materials and all other things requisite and necessary to build the road-bed and prepare the same for the receiving of the superstructure, and also lay, line, surface, and fill the track upon that portion of a certain other railroad, to wit, the Indiana, Illinois and Iowa railroad, known and designated as sections numbers 1 to 46, inclusive, of the Indiana Division of said railroad, in such a manner as to conform in every respect to certain specifications annexed to said written agreement and made a part of said written agreement, and upon the conditions that the said work should be commenced within ten days after the execution of said written agreement, or as soon thereafter as said Indiana, Illinois & Iowa Railroad Company should have acquired a title to the land for the

right of way for said railroad, and that said work so agreed to be done by said plaintiffs should be completed on or before the first day of January, 1883; and upon the further condition that said work should be executed under the direction and supervision of the chief engineer of said defendant and his assistants, by whose measurements and calculations the quantities and amounts of the
12 several kinds of work performed under said written agreement should be determined, and whose determination should be conclusive upon said plaintiffs and defendant, and who should have full power to reject all or condemn all work or materials which, in his or their opinion, should not fully conform to the spirit of said agreement; and that said chief engineer should decide every question which could or might arise between the said plaintiffs and defendant relative to the execution of the said work, and whose decision should be final and binding upon said plaintiffs and defendant; and upon the further condition that said work should be performed in such a manner that the said plaintiffs should not be relieved from immediate charge and responsibility of said work, and that no part thereof should be transferred or subcontracted unless by the sanction and approval, in writing, of the said engineer; and it was also agreed between said plaintiffs and said defendant in said written agreement, and the said defendant then and there promised the said plaintiffs, that whenever said written agreement should be completely performed on the part of said plaintiffs, and the said engineer should have certified the same in writing, said defendant should, within 90 days thereafter, pay to the said plaintiffs, for said work and materials so done and furnished, any remaining sums still due for work and materials under said written agreement, as follows, to wit:

For clearing, $20 per acre.
" grubbing, $5.00 per hundred feet.
" earth-work, 20 cents per cubic yd.
" rock excavation, 75 cents per cubic yd.
" timber & plank in foundations, cattle guards, sluices, and bridge abutments, $27.50 per 1,000 feet, board measure.
For timber and plank in trestle-work and piers, $27.50 per thousand feet, board measure.
13 For timber and planks in culverts, $27.50 per 1,000 feet, board measure.
For planks in crossings, $27.50 per 1,000 feet, board measure.
For piles, lineal foot, including driving, 30 cents.
For wrought iron, per pound, 6 cents.
" cast " " "
" spikes " " "
" laying, lining, surfacing, and filling track, per lineal mile, $400.00.

And at, to wit, the day and year aforesaid, it was further agreed, by & between the said plaintiffs and said defendant, that the said defendant should pay to the said plaintiffs, on the certificate of the engineer for work done by said plaintiffs under said agreement, 90 per cent. of the value of said work done as provided in said written agreement, deducting ten per cent. from the value of said work done as an

agreed compensation for damages to be retained by the said defendant in case the whole amount therein named should not be done in accordance with the said written agreement, and the said written agreement being so made, afterwards, to wit, on the sixth day of November, A. D. 1882, at, to wit, the county of Kankakee aforesaid, in consideration thereof, and that said plaintiffs, at the special instance and request of the said defendant, had then and there undertaken and faithfully promised said defendant to perform and fulfill the said agreement in all things on the said plaintiffs' part and behalf to be performed and fulfilled, it, the said defendant, undertook and then and there faithfully promised the said plaintiffs to perform and fulfill the said agreement in all things on the said defendant's part and behalf to be performed and fulfilled, and although the said plaintiffs have always, from the time of making of the said agreement, performed and fulfilled all things on their part
14 and behalf in the said agreement to be performed and fulfilled, and did afterwards, to wit, on the day and year first aforesaid, at, to wit, county of Kankakee aforesaid, enter upon and commence the said work, and for that purpose did procure and find all materials and labor necessary for performing the same, and did the same in part, to wit, excavated, to wit, 60 thousand cubic yards of earth-work, and moved and filled, to wit, 200,000 yards of embankment, and cleared, to wit, 100 acres, and grubbed, to wit, 10,000 feet, and furnished and placed upon the line of said railroad in the substructure thereof, under the direction of said engineer, a large amount of timber and plank in foundations, cattle guards, sluices, and bridge abutments, and in the trestle-work and piers and in the culverts and crossings, to wit, 100,000 feet, board measure, of such timber and planks, and furnished and drove piles to a large amount, to wit, 6,760 lineal feet of such piles, and then and there furnished and used and placed upon the said road in the substructure thereof, under said written agreement, a large amount of wrought and cast iron, to wit, 7,000 pounds, and then and there did said work and furnished said materials aforesaid in accordance with the terms in said written agreement contained on the part and behalf of the said plaintiffs to be done and furnished in accordance with the terms of said written agreement aforesaid, and afterwards, to wit, on the seventh day of November, 1882, at, to wit, the county of Kankakee aforesaid, the said plaintiffs applied to said chief engineer of said defendant, who was then and there in the employ of and was agent for said defendant, to make out, deliver, and certify in writing or to give a certificate to said plaintiffs for said work done and materials furnished, which the said plaintiffs allege were all done and furnished, at, to wit, the day and year aforesaid, at the county aforesaid; and although it was then and there the duty of the
15 said chief engineer to certify in writing and give a certificate to said plaintiffs for the said work done and materials furnished aforesaid, yet the said chief engineer fraudulently and corruptly refused to give such certificate, and the said defendant fraudulently and corruptly connived with and procured the said engineer to refuse to give such certificate to said plaintiffs; and although

the said plaintiffs have always been ready and willing to perform and complete the whole of said work and furnish the whole of said materials in pursuance of said agreement, of all of which said premises the said defendant hath had notice, to wit, at the county of Kankakee aforesaid, yet the said plaintiffs in effect say that the said defendant, conniving and conspiring with its said engineer and chief engineer, and contriving and wrongfully intending to injure the said plaintiffs, did not nor would perform the said agreement nor its said promise and undertaking, but thereby craftily and subtly deceived the said plaintiffs in this, to wit, that there was then and there, to wit, due to said plaintiffs for the said work done and materials furnished under said written agreement at, to wit, the county of Kankakee, and on, to wit, the seventh day of November, A. D. 1882, for the said work done and materials furnished by the said plaintiffs under and in accordance with the said written agreement and at and after the prices therein specified a large sum of money, to wit, the sum of $60,000, of which said sum the said defendant then and there owed to the said plaintiffs, and it was then and there the duty of the said defendant to pay to the said plaintiffs, to wit, 90 per cent of said sum so due and owing, to wit, the sum of $54,000; but the said defendant did not nor would pay the said sum of $54,000 or any part thereof, but, on the contrary, hath hitherto wholly neglected and refused so to do, to wit, at the
16 county of Kankakee aforesaid; and the said defendant, further disregarding the said agreement and its said promise and undertaking, afterwards, to wit, on the seventh of November, 1882, at, to wit, the county of Kankakee aforesaid, did not nor would permit or suffer the said plaintiffs to proceed and complete the said work and furnish said materials, and then and there wholly hindred and prevented them from so doing, and then and there wrongfully discharged the said plaintiffs from any further performance or completion of their said agreement in writing and their said promise and undertaking, whereby the said plaintiffs have lost and been deprived of the profits and advantages which they otherwise might and would have acquired from the completion of the said work, to wit, at the county of Kankakee aforesaid, and the said defendant hath also hitherto wrongfully neglected and refused to pay to said plaintiffs the said 90 per centum of the whole of said work and materials so to be paid as said work should progress, and hath also hitherto wholly neglected and refused to pay to said plaintiffs the other ten per centum of the value of said work and materials so as aforesaid done and furnished by said plaintiffs, and still neglects and refuses so to do at, to wit, the county of Kankakee aforesaid.

Whereas, also, heretofore, to wit, on the 6th day of September, A. D. 1882, the said defendant, in consideration that said plaintiffs as such copartners had agreed to and with the said defendant to do the work and furnish the materials for the earth-work, clearing, grubbing, timber, and planks for foundations, cattle guards, sluices, and bridge abutments, trestle-work and piers, culverts and crossings, and to furnish and provide piles and drive the same, also furnish wrought and cast iron and spikes, and to do the laying,

lining, surfacing, and filling of the track and all other things requisite and necessary to complete the road-bed and
17 prepare the same for receiving the superstructure of that portion of a certain other railroad, known as sections numbered 1 to 46, inclusive, of the Indiana Division of the Indiana, Illinois and Iowa railroad, and should complete the said work on or before the first day of January, 1883, it, the said defendant, then and there faithfully undertook and promised said plaintiffs as such copartners to pay to them as such work should progress 90 per centum of the value of said work as follows, to wit: $20 per acre for clearing; $5.00 per hundred feet for grubbing; 20 cents per cubic yard for earth-work; 75 cents per cubic yard for excavating loose rock; 27.50 dollars per one thousand feet, board measure, for timber and planks in foundations, cattle guards, sluices, and bridge abutments, trestle-work and piers, culverts and crossings, and 30 cents per lineal foot, including driving, for piles, and six cents per pound for wrought and cast iron, and six cents for spikes, and for laying, lining, and surfacing and filling the track of said railroad four hundred dollars per lineal mile.

And the said defendant also, in consideration thereof as aforesaid, then and there promised and agreed to and with the said plaintiffs as said copartners to pay to them the other ten per cent. — the value of said work done and materials to be furnished by said plaintiffs when the said work should be completed and finished; and afterwards, to wit, on the day and year last aforesaid, — to wit, the county aforesaid, the said plaintiffs as such copartners, relying upon the said promises and agreement of the said defendant, commenced the said work and furnished the said materials; and afterwards, to wit, on the 14th day of November, A. D. 1882, at, to wit, the county aforesaid, there was then due and owing from the said defendant to the said plaintiffs as such copartners the further sum of, to wit, fifty-four thousand dollars, as and for 90 per cent. of the value of the
18 said work before that time done and performed and the value of said materials before that time furnished and supplied by the said plaintiffs in and about the doing of said work; and on, to wit, the day and year last aforesaid, and at, to wit, the county aforesaid, the said plaintiffs demanded of the said defendant to pay to them, the said plaintiffs, said 90 per cent. of the value of said work done and materials furnished before that time by said plaintiffs as aforesaid, to wit, the sum of fifty-six thousand dollars; and the plaintiffs aver that the said defendant wrongfully refused to pay to them the said 90 per centum of the value of said work done and the materials furnished as said work had progressed, to wit, the said sum of fifty-six thousand dollars, and has hitherto wrongfully neglected and refused to pay to the said plaintiffs the said sum of 90 per cent. of the value of the said work done and materials furnished and to pay the same has hitherto wholly neglected and refused at, to wit, the county of Kankakee aforesaid.

And whereas, also, heretofore, to wit, on the 17th day of January, A. D. 1883, at, to wit, the county of Kankakee aforesaid, the said defendant was indebted to the said plaintiffs as such copartners in

the sum of sixty thousand dollars, lawful money of the United States of America, for the work and labor, skill, care, and diligence of the said plaintiffs by the said plaintiffs before that time done, performed, and bestowed in and about the building of a certain other railroad for said defendant and the business of said defendant and for said defendant and at its, said defendant's, special instance and request, and also for divers timber, planks, piles, wrought and cast iron and spikes, and other divers materials and other necessary things by the said plaintiffs as such co-partners before that time found and
19 provided and used and applied in and about that work and labor and in and about building that certain railroad last mentioned for the said defendant, and at *his* like special instance and request and being so indebted it, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, to wit, the county aforesaid, undertook and then and there faithfully promised the said plaintiffs as such copartners to pay them the said last-mentioned sum of money when it, the said defendant, should be thereunto afterwards requested.

And whereas, also, afterwards, to wit, on the day and year last aforesaid, at, to wit, the county aforesaid, in consideration that the said plaintiffs as such copartners, at the like special instance and request of the said defendant had before that time done performed, and bestowed other *his* work and labor, skill, care, and diligence in in and about building a certain other railroad for said defendant, and in and about other the business of the said defendant and for the said defendant, and had also at the like special instance and request of the said defendant before that time found and provided divers other materials and necessary things and divers timber, planks, piles, wrought and cast iron and spikes, and used and applied the same in and about building said last-mentioned railroad and said last-mentioned work and labor, it, the said defendant, undertook and then and there faithfully promised the said plaintiffs as such copartners to pay them so much money as they therefor reasonably deserved to have of the said defendant and when it, the said defendant, should be thereunto afterwards requested; and the said plaintiffs aver that they therefore reasonably deserved to have of the said defendant the further sum of sixty thousand dollars of like lawful money, to wit, at the county of Kankakee aforesaid, whereof the said defendant afterwards, to wit, on the day and
20 year aforesaid, there had notice; nevertheless, the said defendant, not regarding *his* said several promises and undertakings, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiffs, in this behalf, hath not as yet paid the said several sums of money or any or either of them or any part thereof to the said plaintiffs, although often requested so to do, but the said defendant to pay them the same hath hitherto wholly neglected and refused and still doth neglect and refuse, to the damage of the said plaintiffs of sixty thousand dollars; therefore they bring their suit, &c.

And whereas, also, the said defendant heretofore, to wit, on the 17th day of January, in the year of our Lord one thousand eight

hundred and eighty-three, at Kankakee, to wit, at the county aforesaid, became and was indebted to the said plaintiffs as such copartners in the sum of sixty thousand dollars of lawful money of the United States of America for divers goods, wares, and merchandise by the said plaintiffs before that time sold and delivered to the said defendant, and at the special instance and request of the said defendant, and being so indebted to the said plaintiffs the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, in consideration that the said plaintiffs as such copartners had before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiffs, the said defendant then and there undertook and faithfully promised the said plaintiffs that the
21 said defendant would well and truly pay to the said plaintiffs so much money as the last aforesaid goods, wares, and merchandise at the time of the sale and delivery thereof were reasonably worth when the said defendant should be thereunto afterwards requested; and the said plaintiffs aver that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further sum of sixty thousand dollars of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, on the same day and year and at the place aforesaid, had notice.

And whereas, also, the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, was indebted to the said plaintiffs in the further sum of sixty thousand dollars of like lawful money as aforesaid for money before that time lent and advanced by the said plaintiffs to the said defendant and at the like special request of the said defendant, and in the like sum for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant and at the like request of the said defendant, and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiffs, and in the like sum for other money before that time and then due and owing the said plaintiffs for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiffs, and in the like sum for the price and value of work then done and materials for the same provided by the said plaintiffs for the said defendant and at the like special request of the said defendant; and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid,
22 undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the

several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, accounted, together with the said plaintiffs, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of sixty thousand dollars of like lawful money as aforesaid; and, being so found in arrear and indebted to the said plaintiffs, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant, although often requested, etc., hath not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant hath hitherto altogether refused and still doth refuse, to the damage of the said plaintiffs of sixty thousand dollars; and therefore the said plaintiffs bring suit, etc.

T. P. BONFIELD,
Per J. S. C., &
JNO. S. COOPER,
Plaintiffs' Attorneys.

23 *Copy of Account Sued On.*

Western Air Line Construction Co. to McGillis & Co., for the use of Jno. S. Cooper, trustee.

To balance due for work done under the contract between the parties	$50,000
To loss of profits on track-laying	5,000
To loss of profits in completing the substructure	5,000
Total	$60,000
To goods, wares, and merchandise sold and delivered	$60,000
To money lent and advanced	60,000
To money paid, laid out, and expended	60,000
To money had and received to and for the use of said plaintiffs	60,000
To money due for interest and forbearance	60,000
To labor, services, and material	60,000
To balance due on account stated	60,000
To labor, services, material under contract hereto attached	60,000

Plaintiffs' Affidavit of Amount Due.

STATE OF ILLINOIS, }
County of Kankakee, } ss:

Circuit Court of Kankakee County, to April Term, A. D. 1883.

WILLIAM A. MCGILLIS and JAMES HAGAN, for the use of John S. Cooper, Trustee,

vs.

WESTERN AIR LINE CONSTRUCTION COMPANY.

24 William A. McGillis, being duly sworn, says that the demand of the plaintiffs in the above-entitled cause is for work done and materials furnished to said defendant upon the line of the Indiana, Illinois and Iowa railroad under a written contract between said plaintiffs and said defendant, and that there is due to the plaintiffs from the defendant, after allowing to it all just credits, deductions, and set-offs, the sum of thirty-four thousand eight hundred and ninety-four & $\frac{7}{100}$ dollars ($34,894.70).

W. A. McGILLIS.

Subscribed and sworn to before me this 24th day of March, 1883.
[SEAL.] J. FRANK LEONARD, *Clerk.*

Copy of the Contract under which Work was Done and Suit is Brought.

Western Air Line Construction Co.

Specification of Manner of Laying Track on the Indiana, Illinois and Iowa R. R.

Cross-ties.

There will be twenty-eight hundred (2,800) cross-ties per mile. They will be laid so that their longitudinal centers will coincide with the centers furnished by the engineer, each tie angled to the rails and so placed that each tie shall have equal bearing under each rail.

The ties for the joints and shoulders will be carefully selected and will be hard wood if furnished by the construction company for that purpose.

25 Rails.

The rails will be so handled in loading and unloading as not to bend or kink them to their detriment. When so bent or kinked they will be carefully straightened by the use of a "jaw-crow."

The joints of rails will be laid square and exactly opposite to each other and on the center of the same joint tie.

In passing around curves allowances of six (6) inches may be made (at the discretion of the engineer), and when this limit is reached a rail one foot short will be used. Steel rails must in no case be cut. Closures at switches will be made with iron rails or pieces of broken steel. If beveled rails are used the bevel must be laid towards the center. No rails having defects or flaws will be laid in main track. When such rails are discovered in main track they will be taken out and replaced by others at the contractor's own expense.

The joints will be made "open" or "closed" to allow for expansion, as the engineer may from time to time determine; iron shims alone allowed. In passing curves of less radius than three thousand (3,000) feet the rails must be properly curved to fit the augument. No joint will be allowed within six feet of the end of a bridge, cattle guard, or other like structure.

Fastenings.

In placing the fish plates care must be taken that the proper side is placed next to the rails (the angle plate outside and the plain plate inside the joint), and in tightening the bolts great care must be used to secure a perfect and compact fit for head and nut, and the nuts properly set so as to secure the full strength of the bolt and not to strip the threads. There will be four spikes driven in each tie. In starting the spikes they must be set perpendicular
26 and not leaned or started from the spiker. They will be well and truly driven home so each head has a full and compact clinch on the flange of the rail, but not in such a manner as to injure the head of the spike.

The back spiking will in no case be more than one-fourth (¼) of a mile in rear of the end of the track. The contractor will be held responsible for all damages to adjacent lands by reason of fences or gates being left open, and the construction company may settle such damage with owner, and may forever retain same from work done under this contract.

Lining.

The lining of the track must be in charge of a skillful foreman and the track carefully and accurately lined to the exact centers furnished by the engineers, and will be kept well up the back spiking.

Surfacing & filling.

The track will be well and truly surfaced so as to conform to the original gradements of the road. Each and every tie will be tamped with the best class of material that can be procured adjacent to the road-bed, but in no case will the material for surfacing or filling be taken from the slopes of the cuttings or embankments without the consent of the chief engineer in writing.

The surfacing and filling embankments over ten (10) feet in height or across swampy or boggy places the material must be handled on

the road-bed from the sand cuttings on the line of the road. After the track has been surfaced to the entire satisfaction of the engineer, and not before, the necessary filling may be done.

In filling the track the earth will be rounded up in the center to three (3) inches higher than the tops of the rails and so sloped
27 on each side as to leave a free passage for water under the rails between each tie. On curves the outer rail will be elevated to suit the degree of curvature, as may be decided by the engineer. This elevation will extend three rails' lengths from beginning and ending of curves.

The surfacing and filling will be kept not farther than one mile from end of track. When surfaced and filled all embankments must be twelve (12) feet wide at bottom of ties.

Track supplies, engines, &c.

The construction company will furnish all track supplies in the yards at Momence necessary to lay the track to North Judson, the contractor to load all such material and supplies in the yards at Momence and unload same at end of track. The construction company will furnish one (1) engine, with men and fuel to run the same, and all necessary cars, including one "lorry car." The contractor will keep the lorry car in repair and turn the same over to the construction Co. at the termination of this contract in as good condition as when received, except the necessary wear.

The contractor will never refuse to receive into his train and transport any and all cars loaded with material for bridges, cattle guards and crossings, fencing, depots, stock pens, or any other material, of whatever nature, to be used in the construction of this railroad.

Estimates & payments.

The work shall be measured by the lineal mile. Side tracks shall be measured from mouth to mouth of switch, and no extra charge shall be made or allowed for placing frogs, switch stands, railroad crossings, &c.

Upon the completion of each ten (10) miles of this work, to the entire satisfaction of the chief engineer, and when he has certified to the same in writing, the construction company will pay the contractor the sum of four hundred (400) dollars for each lineal
28 mile of main track and for each mile of side track, deducting ten (10) %, to be forever retained in case the work under this contract is not fully completed as hereinbefore set forth.

Road-bed.

The construction company will furnish to the contractor a well-graded road-bed, such as is customary in like cases.

Western Air Line Construction Company.

Specifications for pile and frame trestle bridges, timber, culverts, cattle guards, road crossings, etc.

All timber used in the different parts of the different structures must in all cases be sound, live timber, sawed or hewn true and out of wind to the exact scantling lengths and kind designated by the engineer, and free from all wane shakes, sap, loose or block knots, or other symptoms of decay, and particularly adapted to the peculiar requirement of the part for which it is used. Such portions of it as the engineer or inspector may direct shall be dressed with plane before being put in the work, so as to present a good surface for painting.

All mortices, tenons, joints, bearings, boxing, scarfings, and framing generally shall be perfect and true and of such sizes, shapes, and character as shall be shown by plans or ordered by the engineer or inspector.

The chord and sway-brace bolts shall be three-quarters (¾) of an inch in diameter, and of such lengths as may be ordered, and provided at each end with one (1) capped O. G. washer not less than three (3) inches in diameter.

All bolts, washers, spikes, and other iron must be put in place carefully so as to receive no injury, and the proper tools and augers provided so that the timber will be the least injured or destroyed
29 in placing it. Especial care must be taken that chord and sway-brace bolts and washers fit tightly and evenly on the stringers, piles, and braces, and that spikes are driven home properly.

Spans shall usually be sixteen feet.

Fenders shall be of white pine, boxed one and one-half inches and spiked on the outer edge of the bridge ties in a secure manner.

Ties shall be of white or burr oak and securely spiked to the stringers with boat spikes. They shall be sized or boxed so that they will make an even and true bearing on each of the track rails when laid. Any tie upon which the rail does not have a bearing equal and true the same as the adjacent ties shall not be estimated or paid for either in monthly or final estimates. The ends shall be sawed off so as to form lines, respectively, equidistant from the center line.

The chords, of which there will be two (2), one directly under each rail, shall consist of three (3) lines of stringers packed or dropped together in such manner as the engineer may direct, but usually with a packing block.

Stringers shall be of white pine, sixteen feet long, of such size as may from time to time be designated. The track-supporting stringers shall be laid so that the centers on top shall be equidistant two and one-half feet from the center line, as established by the engineer. They shall be so boxed, but never so as to reduce their net dimensions, and leveled as that their tops shall present a perfect

and true plane in all directions on the entire bridge when on a tangent, and in the direction of the radii of the curve, and so that the tops of the ties at the center line will also be a perfect plane in the longitudinal direction of the bridge when on a curve.
30 Their butting joints shall in all cases be tight and perfect, and directly over the center of the cap transversely.

The caps shall be of such size as ordered. They shall be framed with extreme care so as to secure the most and best bearing possible on all the piles or posts which support them. The ends, respectively, shall be sawed and squared off at equidistances from the center line as given by the engineer. On pile trestles they will be bolted to the piles with drift bolts $\frac{7}{8}$ of an inch in diameter and 22 inches long; on frame trestles they will be morticed.

Sway braces shall be so framed and bolted on piles or posts as to secure the entire and full strength of the timber in preventing lateral motion of the bridge. They will generally extend from the cap to the lower end of the outside pile or post in the bent on the opposite side of the bridge.

Posts shall be of such lengths and sizes designated and shall be framed perpendicular or with a batter, as may be directed. Particular care shall be taken that the shoulders or batter posts shall have a full and perfect bearing both on the caps and sills.

Sills shall be of square or flatted timber and of such sizes and lengths as designated. If flatted they shall be estimated at the feet, board measure, they would make if squared. They shall be laid on the subsills as to secure a perfect and true bearing on each where the foundation is on rock. If required, they shall be bolted to same with Lewis bolts instead of being placed on subsills. They shall never be spliced unless by direction or consent of the engineer or inspector.

Subsills may be of flatted sticks and will be estimated at the feet, board measure, they would make if squared, provided no
31 allowance is made for sticks over and above the width ordered. They shall be placed in position carefully and thoroughly bedded and filled between, so as to secure perfect and even settleage.

Piles shall be of white or burr oak, straight, of sound and live timber, and free from bad knots or shakes. They shall not be less than ten inches in diameter inside the bark at the smaller end and not less than thirteen inches in diameter inside the bark at the larger end, and of such lengths as may be designated by the engineer. They shall be peeled or have the bark entirely taken off and be well banded with good and substantial iron bands (such as shall be approved by said engineer or inspector) before being driven. They shall be sharpened with "needle" or blunt points, according to the nature of the material through which they are driven, as determined by the engineer or inspector. All piles shall be driven as long and in such manner as the engineer or inspector shall direct. The hammers, leaders, and other tools and machinery used in driving shall be such as are approved by the said engineer or inspector. All piles that shall be shattered or split while being driven or that

shall be driven so much out of place or otherwise as to in any way injure the character of the work shall be replaced by the contractors without further charge. No pile shall be used shorter than the length designated by the bill for the particular bridge where such pile is used, and any discovery, either at the time or subsequently, that piles shorter than those billed have been used without the consent or direction of the engineer given in writing shall be sufficient reason to condemn all the piles in the bridge where the discovery is made, and no estimate, either monthly or final, shall be made for piles in said bridge. Stumps shall be grubbed out, and rocks,
32 logs, and other obstructions shall be removed, so that the piles can be properly driven by the contractors, without extra charge other than the regular price per foot for driving such piles. In bridges where any of the bents are over twelve feet in height the outside pile shall be driven at a batter of one inch to the foot, if so directed by the engineer or inspector.

Any pile that may have appeared good and passed inspection, but after driving shall be found to be decayed or in any way defective, shall be replaced by the contractor without extra charge. Proper appliances shall be provided for straightening piles in a bent, so that they will be in line and give a full and complete bearing to the cap when placed thereon, and so as to come directly under the stringers when the same are in place. The tenons on piles shall be of such sizes and lengths as ordered, and shall be framed so as to give the greatest strength and bearing to the caps. By the consent of the engineer or inspector, in writing, piles that are split can be bolted together instead of being replaced, but the bolts so used shall be furnished by the contractors at their own expense.

Queen-truss, highway, girder, and other small span bridges shall be framed and erected in accordance with the plans and directions furnished by the engineer and estimated by the thousand feet, board measure, the same as other bridges.

Culverts shall be made of sawed or counter-hewn timber, so that the longitudinal joints, both in walls and roof, shall be perfect and tight. The butting joints shall be square or scarfed, but in all cases must be close. The walls and other parts shall be pinned or dowelled together with wooden pins in such manner as may be directed.

If iron is used it must be at the contractor's expense, un-
33 less ordered by the engineer. The foundations may be of flatted timber, provided they shall have the full bearing surface ordered. When pits have been once properly dug the contractor shall thereafter do all clearing and bailing and all other work necessary at his own expense.

Cattle guards shall be built strictly in accordance with the plans and directions given by the engineer. Connecting fences shall be a part of the cattle guards and posts, estimated at the square scantling ordered. The contractors shall dig out the pits therefor and do all back filling necessary to give solid foundation for adjacent track ties. No earth from said pit shall be so placed as to obstruct the ditches in any manner. Road crossings shall be made of such lum-

ber and in such way as shall be directed. All boxes, culverts, &c., necessary for making proper road approaches to said crossings shall be meant and included in the term "road crossings," and shall be estimated in the same manner. All foundations and clearing out of ditches necessary for properly placing such boxes shall be done by the contractor at his own expense. When the embankments are dug away for the purpose of more conveniently putting in the bank caps the earth so removed shall be replaced by the contractor, so as to make a perfect connection between the embankment and bridge.

In hauling timbers for any of the structures the graded road-bed shall not be used for a wagon road, only in such places as permission (in writing) is given by the engineer.

All timber and lumber in the different structures shall be estimated by the thousand feet, board measure. Piling shall be estimated by the lineal feet.

Specification for Gradation.

Clearing.

34 Before grading is commenced the ground included within the right of way or such part thereof as the engineer may order shall be thoroughly cleared of all trees, logs, brush, rubbish, or other perishable materials, all of which shall be removed, burned, or otherwise disposed of as the engineer may direct.

All valuable timber or fire-wood shall be cut into such lengths as deemed best, and put aside and reserved for the use of the company, if the same shall be ordered by the engineer.

Corn-stalks, weeds, and grass shall not be considered as clearing, but nevertheless shall be removed from the space occupied by the road-bed and borrow pits by the contractors without charge, as may be directed by the engineer. Lone or single trees shall be estimated at double the amount of space covered by the limbs and branches of the same.

All clearing shall be estimated by the acre, and only the amount actually cleared and as ordered by the engineer shall be paid for, the same to be determined by the engineer.

Grubbing.

All stumps and large roots within the limits of the roadway which, after grading is finished, will not be covered by two feet of earth, and all stumps standing on bermes shall be grubbed out and removed or destroyed, as the engineer may direct.

All stumps and large roots within the limits of the ditches shall be grubbed out so as to give a free and full passage of the water running in said ditches and not to obstruct the same.

No grubbing shall be allowed for hazel brush or any trees of less than one inch in diameter at a point two feet from the surface of the ground.

No grubbing shall be allowed in cuts of over twelve feet in depth or in borrowing pits unless at the option of the engineer.

35 Grubbing shall be estimated by the station, which shall be understood to mean the amount within the limits of the road-bed, ditches and borrow pits, if ordered, for one hundred feet in length in the direction of the center line.

Earth-work.

The moving of all material of whatever name and character that are not distinctly and unquestionably rock shall be meant and included in the term earth-work.

Excavations shall be taken out and embankments built in such shapes and widths and such slopes as the engineer may determine.

Ditches shall be made throughout all cuts on each side of and parallel with the center line. The dimensions of these ditches and their distance from the center line must be as the engineer directs.

The material contained in the excavations, whether on the main line or side tracks, in ditches, channels, highways, foundation pits, or other excavations, shall be used to make the embankments found on the same section. Should contractors desire to borrow and waste the consent of the engineer must first be obtained in writing, and he shall also determine the extent, mode, and place of such borrowings and wastings, but no material shall be wasted nearer than twelve feet from the edge of cuttings.

Embankments shall be put above grade and made of such extra width at top as will insure their final settling to the true grade and width at top, as may be ordered by the engineer.

Between ditches, borrow pits, and creek channels on the one side and the regular line embankments on the other bermes shall be left of such width as, in the opinion of the engineer, will insure the perfect safety of the latter, and to be never less than six feet

36 wide. In places where contractors in executing the work encroach upon the berme, as originally directed to be left, they shall be required to replace and make good the same as shall be determined by the engineer.

All excavations or embankments designed for public or private road crossings or for creek channels, ditches, or foundations of any description shall be made of such form and dimensions as the engineer may direct, and shall be considered as a part of the regular excavations and embankments of the section upon which they may be found, and shall be executed in all respects as specified herein for work in forming the road-bed, and shall be paid for at regular grading price per cubic yard and no more. All embankments shall be built in such manner as will make them most firm and compact, and special care shall be taken to prevent them from sliding. Whenever practicable they shall be carried up in horizontal layers not exceeding two feet in thickness, and no trees, logs, or other perishable or otherwise unsuitable materials shall be put into them unless by the direction and consent of the engineer.

When embankments run over covered drains or form approaches to pile or other bridges the earth forming such embankments shall

be made as compact as possible, and special care must be taken that their toes shall be full.

All borrow pits or waste beds outside the limits of the railway company's right of way must be bought and paid for by the contractor unless the same be staked off and ordered by the engineer in writing.

Receipts or deeds for said purchases shall be obtained from the person owning lands upon which such pits or beds are made and the same furnished the engineer, to be filed in the office of the company.

37 Valuable materials obtained from excavations which shall be deemed suitable for slope walls, masonry, or other purposes shall, if so ordered by the engineer, be deposited in convenient and accessible places for the use of said company.

All washes to embankments or cuts or filling up of ditches or obstructions of channels that may occur before the work has been completed and received from the contractor by reason of rains, slides, or other causes shall be made good and repaired by said contractor, in such manner as the engineer may direct, before said work shall be received.

When embankments shall have settled below the grade line before the work has been received the contractor must bring them up to the grade designated by the engineer without further charge.

Any section will be received and final estimate made on same as soon as it is completed to the satisfaction of the engineer.

Contractors shall not in any case borrow or waste only by consent and direction of the engineer in writing.

All ditches shall be made even and true on the bottom and of such depths as to carry all water to the openings through the embankments and leave no ponds at the side of same, and no final estimate will be made upon any section on which the borrow pits are not properly drained.

All slopes to embankments or excavations and all widths of roadway shall be made full and true. If left otherwise by the contractor an amount equal to four times the actual amount required to complete the same shall be deducted by the engineer from the quantity estimated for said work.

All excavations and embankments which may be on any section shall be estimated and paid for; only the book or "air" quantities shall be allowed—that is, only the amounts contained within the grade, slope, and surface lines shall be paid for.

38 The amounts which the engineer may direct to be put upon them to insure their final settling to the true grade and width at the top, as hereinbefore specified, shall not be paid for.

Rock excavation.

All stones and boulders measuring more than one cubic yard and all rocks in place in solid ledges that cannot be moved without blasting or with a bar and pick shall be solid-rock excavations.

All stones and boulders measuring more than one-half and less than one cubic yard and all rocks in place that can be moved with-

out blasting and with the use of a bar or pick shall be loose-rock excavations.

All rock excavation shall be taken out to such shapes and depths and dimensions as the engineer may direct. Great care shall be taken in blasting so as not to injure adjacent property, and all the usual appliances for such protection and security shall be provided by the contractor.

All rock for bridge and other masonry shall be carefully excavated in such shape and dimensions as is usual for such rock and shall be deposited in an accessible place for the use of the company.

All rock shall be measured in excavation; but when it is placed in embankment an equal amount shall be deducted from the quantity in such embankment.

Contract for Building the Indiana, Illinois and Iowa Railroad.

KANKAKEE, ILLS., *Sept.* 6, 1882.

This agreement, made and concluded this sixth day of September, A. D. 1882, by and between McGillis & Co., of the first part, and the Western Air Line Construction Company, of the second part, witnesseth as follows, to wit:

39 The aforesaid party of the first part, in consideration of the prices hereinafter agreed to be paid to them by the party of the second part, hereby agree and bind themselves to construct and in every respect complete the grubbing and clearing, grading and timber-work, including the furnishing of materials and all other things requisite and necessary to complete the road-bed and prepare the same ready for receiving the superstructure, and also lay, line, surface, and fill the tract upon that portion of the Ind., Ill. & Ia. R. R., known and designated as sections Nos. 1 to forty-six (46), inclusive, of Indiana Division, in such a manner as will conform in every respect to the annexed specifications, which are hereby made a part of this contract, and to the following conditions, namely:

1st. The work shall be commenced within ten days after the execution of these presents or as soon after as the company shall have acquired a title to the lands and shall be completed on or before the first day of January, 1883.

2d. The work shall be executed under the direction and supervision of the chief engineer of the Western Air Line Construction Company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work performed under this contract shall be determined and whose determination shall be conclusive upon the parties, and who shall have full power to reject all or condemn all work or materials which in his or their opinion do not fully conform to the spirit of this agreement, and said chief engineer shall decide every question which can or may arise between the parties relative to the execution thereof, and his decision shall be final and binding upon both parties.

3d. The several stipulations of this contract shall be per-

40 formed in such a manner that the party of the first part shall not be relieved from the immediate charge and responsibility

of the work, and no part thereof shall be transferred or sub-contracted unless by the sanction and approval in writing of the said engineer.

4th. If any foreman, agent, mechanic, or laborer employed by the contractors shall, in the opinion of the engineer, execute his work in an unfaithful or unskilful manner or in any respect prove remiss or inadequate to the performance of his duty or disrespectful or riotous in his conduct he shall forthwith, by the direction of the engineer, be discharged, and no person shall be employed on the work in the capacity of foreman or overseer who has been previously discharged for neglect or unfaithfulness from any work within the knowledge of said contractor or said engineer.

5th. If any damage shall be done by the party of the first part or persons in their employ to the owners or occupants of lands or other property adjoining or in the vicinity of the work herein contracted to be done the engineer of said company shall have a right to estimate the amount of the said damage and to pay the same to said owner or occupant, and the amount so paid for such damage shall be deducted from the value of the work done under this contract.

6th. All work done under this contract shall be performed without the use of ardent spirits.

7th. All roads to quarries, quarry leave roads for hauling materials, and ways to and from the work, also all grounds for the deposit of materials and the erection of shanties or yards for the performance of work not within the limits of the Ind., Ill. & Ia. Company's land, to be paid by the party of the first part at their own proper charge and expenses.

The aforesaid party of the second part hereby agrees that whenever this contract shall be completely performed on the part
41 of the said party of the first part and the engineer has certified the same in writing the said party of the second part shall, within ninety days thereafter, pay to the said party of the first part any remaining sums due for said work according to this contract, as follows:

For clearing, per acre	$20	
" grubbing, " 100 feet	5	
" earth-work, " cubic yard		20
" excavation of loose rock, per cu. yd.		75
" timber and planks in foundation, cattle guards, sluices, and bridge abutments, per M, b. m.	27	50
" timber and planks in trestle-work and piers, per M, b. m.	27	50
" timber and planks in culverts, per M, b. m.	27	50
" planks in crossings, per M, b. m.	27	50
" piles, per lineal foot, including driving		30
" wrought iron, per pound		06
" cast " " "		06
" spikes " " "		06
" laying, lining, surfacing, & filling the track, per lineal mile	400	00

The prices named for the foregoing items are intended as full consideration for all labor and materials.

It is further agreed between the parties that monthly payments shall be made by the party of the second part on the certificate of the engineer for work done, deducting ten per cent. from the value of work done, as an agreed compensation for damages, to be forever retained by the second party in case the whole amount of work herein named shall not be done in accordance with this agreement.

For the purpose of avoiding all cause of difference or dis-
42 pute between the parties to this contract relative to its true intent and meaning and for the purpose of adjusting in an amicable manner any differences that can or may arise relative thereto it is hereby mutually understood and agreed by the parties as follows, to wit:

1. No extra charges will be claimed or allowed on account of changes either in the line or grade of the road, the prices herein mentioned being considered as full compensation for the various kinds of work herein agreed to be performed.

2. Whenever work is required to be done which is not now contemplated or covered by the prices herein mentioned the engineer shall fix such prices for the work as he shall consider just and equitable and the said parties shall abide by such prices, provided the party of the first part enter upon and commence such work with a full knowledge of the prices so fixed by the engineer; but if the party of the first part declines executing said work at the prices fixed by the engineer, then the party of the second part may enter into contract with any other person or persons for its execution the same as if this contract had never existed; and if extra work or works not provided for in this contract is performed by the contractors with protest or notice in writing to the engineer and to the party of the second part before prices shall have been fixed to such work, then the engineer shall estimate the same at such prices as he shall deem just and reasonable, and his decision shall be final and the party of the first part shall accept of the prices in full satisfaction of their demands against the party of the second part for said extra work, but nothing shall be deemed extra work that can be measured or estimated under the provisions of this contract.

3rd. If the party of the first part refuse or unreasonably neglect to remedy any imperfection which may be pointed out by the
43 engineer or in any manner violate the conditions of this contract so that in the judgment of the engineer there shall be just grounds of apprehension that the work will not be completed in the manner and within the time specified, then it shall be the duty of the party of the second part to serve a written notice upon the said party of the first part, setting forth the grounds of the said engineer's apprehensions and specifying the manner, together with a reasonable time, in which said party may cause such grounds to be removed; and if at the expiration of such time said grounds of apprehension be not removed the full power and authority is hereby mutually vested in said engineer to declare this contract forfeited; and on such declaration being given in writing by the engineer to

the parties thereto the contract shall cease and determine immediately and the said party of the second part may forever retain the ten per cent. on account of the consideration of damages which he may have sustained by reason of the forfeiture of this contract, and the party of the first part hereby agrees to promptly relinquish possession of such work or of the materials designated or procured therefor, and to place the same into the hands of the said party of the second part in such a manner as will enable him to complete the work without hindrance or delays, and said second party shall have the right to re-enter and the said first party or any person or persons to expel and remove therefrom, using such force and means as may be necessary for that purpose.

And he further agrees to relinquish all claims to the ten per cent. retained by the party of the second part on account of said work as above specified, or in case the party of the second part deems it more expedient upon notice in writing from the said engineer to the party of the second part that there is not a sufficient force employed upon the said section or any part thereof to complete it in the manner and
44 within the time herein specified the said party of the second part may employ and put upon the said section or any part thereof (and have full possession of the same) such additional force as the said engineer deems necessary, the expense of the same to be paid by the party of the first part, to be deducted from the estimates of the said party of the first part for work done.

4. It is further agreed by the party of the first part that such portions of the above work as the said engineer may require shall be completed and prepared for the superstructure as soon as practicable, and that when such portion or portions are made ready for the superstructure the said party of the second part may take possession of the same for the purpose of laying down the superstructure, notwithstanding the time for completing the whole of the above contract may not have expired.

5. It is expressly agreed by the party of the first part that the party of the second part may at any time pay so much of the money due the party of the first part on estimates, final or otherwise, above mentioned to the laborers employed by the party of the first part as may be due said laborers and charge the same to the party of the first part, and any or all payments for estimates may be paid to the party of the first part at the office of the party of the second part, or on the work of said contracting party, as the party of the second part may choose.

6. In case any or all the work embraced in this contract shall be permanently suspended by and on account of the party of the second part, which is hereby agreed the party of the second part may do for other causes than heretofore provided for in this contract, then in that case all further operations under this contract shall be suspended within three days after receiving written notice from
45 the party of the second part requiring the further progress of the work to be suspended, and the party of the first part shall have their choice either to consider such suspension temporary and resume work on the same within five days after receiving notice

to resume work or may consider the same at an end and shall receive full pay for all work by them performed under this contract and at the prices herein stipulated, which shall — upon the estimate of the engineer, which shall be final and conclusive between the parties to this contract, which estimate shall not include any anticipated — that might have accrued from the completion of the said work, it being understood that no claim for damages shall be made by the party of the first part on account of any profits that might accrue from the completion of the same.

In witness whereof the parties to these presents have hereunto set their hands in duplicate and attached their seals the day and year first above written.

W. A. McGILLIS.
JAMES HOGAN.
WESTERN AIR LINE CONSTRUCTION CO.,
By F. M. DRAKE, *Pres.*

In presence of—
HENRY SHAW.
J. S. CHIPMAN.

(Endorsed:) Filed March 24th, 1883. J. Frank Leonard, clerk. Filed May 4, 1883. Wm. H. Bradley, clerk.

46 On the same day, to wit, on the fourth day of May, 1883, there was filed in said clerk's office an affidavit of William A. McGillis and James Hogan, from the circuit court of Kankakee county, Illinois, in said entitled cause; which said affidavit is in the words and figures following, to wit:

47 *Affidavit.*

STATE OF ILLINOIS, } ss:
Kankakee County, }

In the Circuit Court of Kankakee County, to the April Term, A. D. 1883.

WILLIAM A. McGILLIS and JAMES HOGAN, for the Use of John S. Cooper, Trustee,

vs.

WESTERN AIR LINE CONSTRUCTION COMPANY.

William A. McGillis and James Hogan, being each first duly sworn, upon oath severally depose and say that the Western Air Line Construction Company, a corporation, is justly indebted to these affiants as copartners under the firm name and style of McGillis and Company, for the use of John S. Cooper as trustee, after allowing all just credits and set-offs, in the sum of thirty-four thousand eight hundred and ninety-four dollars and seventy cents for work done and material furnished by these affiants as such copartners for said Western

Air Line Construction Company in building the railroad known as the Indiana, Illinois & Iowa railroad; and deponents further state that said Western Air Line Construction Company is not a resident of this State, and that its place of residence is at Centerville, in the State of Iowa.

And further deponents say not.

WILLIAM A. McGILLIS.
JAMES HOGAN.

48 Subscribed and sworn to before me this 18th day of January, A. D. 1883.

[SEAL.] J. FRANK LEONARD, *Clerk.*

(Endorsed:) Filed Jan. 18, 1883. J. Frank Leonard, clerk. Filed May 4, 1883. W. H. Bradley, clerk.

On the same day, to wit, on the fourth day of May, 1883, there was filed in said clerk's office the petition of the Western Air Line Construction Company from the circuit court of Kankakee county, Illinois, in said entitled cause; which said petition is in the words and figures following, to wit:

49 *Petition.*

STATE OF ILLINOIS, } *ss:*
Kankakee County, }

Circuit Court. April Term, 1883.

WILLIAM A. McGILLIS and JAMES HOGAN, Copartners, Who Sue for the Use of John S. Cooper, Trustee,

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Attachment.

The petition of the Western Air Line Construction Company represents to this honorable court that your petitioner, at the time of the commencement of this suit, was and still is a corporation organized and doing business under the laws of the State of Iowa; and that William A. McGillis was and still is a citizen of the State of Illinois; and that James Hogan was and still is a citizen of the State of Massachusetts; and that the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars; and that this is a controversy between said Hogan and McGillis, on the one side, as plaintiffs, and The Western Air Line Construction Company, defendant, on the other side, and between citizens of different States.

Your petitioner makes and files herewith a bond, with good and sufficient surety, for its entering into the circuit court of the United

States for the northern district of Illinois, on the first day of
50 its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court if said circuit court shall hold this suit has been wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to accept this petition and said bond, and order the transfer of said suit to said circuit court of the United States for the northern district of Illinois.

[SEAL.] WESTERN AIR LINE CONSTRUCTION COMPANY,
By F. M. DRAKE, *Pres't.*

Attest: T. P. SHONTS, *Sec'y.*

STATE OF IOWA, }
County of Appanoose, } *ss:*

F. M. Drake, being duly sworn, on his oath says he is president of the Western Air Line Construction Company, petitioner, and that he has read the foregoing petition and knows the same to be true.

F. M. DRAKE.

Subscribed and sworn to before me this 31 day of March, 1883.

[SEAL.] W. L. SELBY,
Notary Public.

(Endorsed:) Filed Apr. 4, 1883. J. Frank Leonard, clerk. Filed May 4, 1883. W. H. Bradley, clerk.

51 On the same day, to wit, on the fourth day of May, 1883, there was filed in said clerk's office a bond from the circuit court of Kankakee county, Illinois, in said entitled cause, which said bond is in the words and figures following, to wit:

Bond fov Removal.

Know all men by these presents that the Western Air Line Construction Company, as principal, and J. D. Harvey, as sure*ties*, are held and firmly bound unto William A. McGillis and James Hogan, who sue for the use of John S. Cooper, trustee, and also to John S. Cooper, trustee, in the penal sum of one thousand dollars; the payment whereof, well and truly to be made unto the said William A. McGillis and James Hogan, for the use of John S. Cooper, trustee, and also John S. Cooper, trustee, their heirs and assigns, we bind ourselves, our heirs, successors, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Western Air Line Construction Company having petitioned the circuit court of Kankakee county, State of Illinois, for the removal of a certain cause therein pending, wherein William A. McGillis and James Hogan, who sue for the use of John S. Cooper, trustee, are plaintiffs, and The Western

Air Line Construction Company is defendant, to the circuit court of the United States in and for the northern district of Illinois:

Now, if the said Western Air Line Construction Company shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

52 Witness our hands and seals this 31 day of March, 1883.

WESTERN AIR LINE CONSTRUCTION CO.,
By F. M. DRAKE, *Pres't.* [SEAL.]
JOEL D. HARVEY. [SEAL.]

Attest: T. P. SHONTS, *Sec'y.*

STATE OF ILLINOIS, }
Cook County, } *ss:*

J. D. Harvey, being duly sworn, on his oath says he is worth more than the sum of ten thousand dollars over and above all debts, demands, and liabilities.

J. D. HARVEY.

Subscribed and sworn to before me this 3rd day of April, 1883.
[SEAL.] WALTER M. HOWLAND,
Notary Public.

(Endorsed:) Filed Apr. 4, 1882. J. Frank Leonard, clerk. Filed May 4, 1883. W. H. Bradley, clerk.

53 Afterwards, to wit, on the ninth day of May, 1883, came the defendant, by its attorneys, and filed in said clerk's office its pleas in said entitled cause; which said pleas are in the words and figures following, to wit:

Pleas.

United States Circuit Court, Northern District of Illinois, *ss:*

JAMES HOGAN and WILLIAM A. MCGILLIS, Who Sue for the Use of John S. Cooper, Trustee,

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

And the defendant, by E. Walker and H. K. Wheeler, its attorneys, comes and defends the wrong and injury, when, &c., and says it did not promise in manner and form as the plaintiffs have thereof complained against it, and of this it puts itself upon the country, &c.

And, for a further plea in this behalf, defendant says the plaintiff ought not to have his aforesaid action — it, because it says that the said supposed cause of action in said declaration mentioned are for one and the same thing, to wit, upon the said contract mentioned in the first count of said declaration, and defendant says the said plaintiffs, not regarding their said promises and undertakings, did not nor would perform the contract on their part or do the work or furnish the materials, as agreed in said contract, and the said plaintiffs then and there abandoned work under the said contract and
54 notified this defendant that it could not nor would not complete the said work and furnish material, as agreed in said contract, and the defendant avers that the plaintiffs then and there abandoned said work, and that the defendant, in pursuance of the terms of said contract, placed a large force of teams and men at work on said road, and that the cost of completing the same was in excess of the plaintiffs' demand the sum of fifty thousand dollars, which damages the defendant has sustained by reason of the non-performance by the plaintiffs on their part of said contract, which sum of money the defendant is ready and willing and hereby offers to set off against the plaintiffs herein, and this it is ready to verify.

And, for a further plea in this behalf, the defendant says the plaintiffs ought not to have their aforesaid action against —, because it says that soon after the first day of November, 1882, the said plaintiffs, disregarding their said undertakings and promises, refused to construct said road-bed and do the necessary work and furnish the materials for the same, as provided in the said contract, to the satisfaction of the chief engineer of defendant,but, on the contrary, neglecting and refusing to perform its said undertakings and promises, refused to put on a sufficient force of men and teams, as directed by their said chief engineer of defendant, to construct and complete said road in the manner and at the time agreed upon, and the defendant was thereby greatly damaged in, to wit, the sum of fifty thousand dollars, and this it is ready to verify.

And, for a further plea, defendant says the plaintiffs before and at the time of the commencement of this suit was and still is indebted to it, the defendant, in the sum of fifty thousand dollars for money paid out by the defendant, under its contract with plaintiffs, for the work and materials necessary to complete said road-bed in
55 accordance with the terms of said contract, and also on a like sum for money paid out for materials for building a railroad from Momence, Illinois, to North Judson, Indiana, and also in a like sum for money paid, laid out, and expended by the defendant for the use of the plaintiffs, which sums of money exceed the plaintiffs' demands, and the defendant is ready and offers to set off against the plaintiffs' demand, and this the defendant is ready to verify, &c.

E. WALKER,
H. K. WHEELER,
Def't's Sol'rs.

United States Circuit Court, Northern District of Illinois, *ss:*

Hamilton K. Wheeler, being duly sworn, on his oath says that he is attorney for defendant and is authorized to make this affidavit. *Defendant* says the defendant here in the above cause has a good defense to this suit upon the merits as to the whole of the plaintiffs' demands, as he verily believes.

HAMILTON K. WHEELER.

Subscribed and sworn to before me this 9th day of May, 1883.

E. A. DRUMMOND,
U. S. Com'r.

(Endorsed:) Filed May 9, 1883. Wm. H. Bradley, clerk.

56 Afterwards, to wit, on the twenty-seventh day of February, 1884, there was filed in said clerk's office a stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

United States Circuit Court, Northern District of Illinois.

WILLIAM A. MCGILLIS *et al.*, — Use of John S. Cooper,

vs.

WESTERN AIR LINE CONSTRUCTION COMPANY.

It is stipulated and agreed that when the above-entitled cause is called for trial at the present term of said court it shall be passed to be afterwards tried before Honorable Romanzo Bunn, judge of the United States district court for the northern district of Wisconsin, and a jury, or before such other district judge of the United States in the seventh circuit as the circuit judge of said circuit shall designate for the trial thereof.

JNO. S. COOPER,
Att'y for Pl'ffs.
E. WALKER,
Att'y for Def't.

(Endorsed:) Filed Feb'y 27, 1884. Wm. H. Bradley, clerk.

57 Afterwards, to wit, on the twenty-eighth day of March, 1884, there was filed in said clerk's office a stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

United States Circuit Court, Northern District of Illinois, *ss:*

HOGAN & MCGILLIS, Who Sue for the Use of John S. Cooper,

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

It is stipulated the defense may give in evidence, under a plea of the general issue, any matter of defense, the same as if specially pleaded, and all questions of pleading by either party are hereby waived.

JNO. S. COOPER,
Att'y for Pl'ffs.
H. K. WHEELER,
Att'y for Def't.

(Endorsed:) Filed March 28, 1884. Wm. H. Bradley, clerk.

58 On the same day, to wit, on the twenty-eighth day of March, 1884, came the defendant, by its attorneys, and filed in said clerk's office its plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

United States Circuit Court, Northern District of Illinois, *ss:*

JAMES HOGAN and W. A. MCGILLIS, Who Sue for the Use of J. S. Cooper,

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Attachment.

And now comes the said defendant and says it did not undertake and promise in manner and form as thereof complained against it, and of this it puts itself upon the country.

E. WALKER,
H. K. WHEELER,
Att'ys for Def't.

(Endorsed:) Filed March 28, 1884. Wm. H. Bradley, clerk.

59 On the same day, to wit, on the twenty-eighth day of March, in the adjourned March term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Now come the parties, by their respective attorneys, and, upon issue joined thereupon, comes a jury of good and lawful men, to wit, George A. Taylor, John Downing, C. G. Pettibone, Daniel Shehan, William H. Johnson, L. P. Narramore, C. C. Wilcox, D. W. Cresey, William O. Gregory, Edward Bohanan, N. B. Storm, and Henry J. Traver, who were all duly elected, tried, and sworn well and truly to try said issue, and, after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

60 Afterwards, to wit, on the twenty-ninth day of March, in the adjourned March term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

Now come again the parties, by their respective attorneys, and now come also the jury in this behalf empaneled and sworn, and, on motion of the plaintiffs, by their attorney, and with the consent of the defendant, by its attorneys, leave is given them to file the writ of attachment in this cause which was not put into the transcript filed herein; and, after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until Monday morning next.

On the same day, to wit, on the twenty-ninth day of March, 1884, there was filed in said clerk's office an attachment bond from the circuit court of Kankakee county, Illinois, in said entitled cause; which said attachment bond is in the words and figures following, to wit:

61 Know all men by these presents that the Western Air Line Construction Company, a corporation organized under the laws of the State of Iowa, and F. M. Drake and J. D. Harvey, are held and firmly bound unto William A. McGillis, James Hogan,

and John S. Cooper, trustee, in the sum of fifty thousand dollars; for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this 25th day of January, A. D. 1883.

The condition of the above obligation is such that whereas William A. McGillis and James Hogan, who sue for the use of John S. Cooper, trustee, did, on the 18th day of January, A. D. 1883, sue out of the circuit court of Kankakee county, Illinois, a writ of attachment against the Western Air Line Construction Company for the sum of thirty-four thousand eight hundred and ninety-four dollars and seventy cents ($34.894.70), which said writ of attachment the sheriff of Kankakee county, Illinois (George R. Letournean), has executed by levying on the property of the Western Air Line Construction Company, as appears from the return of said officer to said writ:

Now, if the said Western Air Line Construction Company shall pay to the plaintiffs in said suit the amount of the judgment and costs that may be rendered against it in said suit on a final trial thereof within ninety days from the date of said judgment, then this obligation to be void; otherwise to remain in full force and effect.

WESTERN AIR LINE CONSTRUCTION COMPANY,
[SEAL.] By F. M. DRAKE, *Pres't.*
FRANCIS M. DRAKE. [SEAL.]
JOEL D. HARVEY. [SEAL.]

Attest: T. P. SHONTS, *Sec't'y.*

62 STATE OF ILLINOIS, } ss:
Kankakee County, }

In the Circuit Court of Kankakee County, to the April Term, A. D. 1883.

WILLIAM A. MCGILLIS and JAMES HOGAN, for the Use of John S. Cooper, Trustee,

vs.

WESTERN AIR LINE CONSTRUCTION COMPANY.

Attachment.

STATE OF ILLINOIS, } ss:
Cook County, }

Francis M. Drake, being first duly sworn, says that he resides at Centerville, in the State of Iowa, and that he is about to become surety on a bond to be given by the defendant in the above-entitled cause to have the property levied on under the writ of attachment issued in the above-entitled suit restored to said defendant and said attachment dissolved.

This affiant, in justification of his pecuniary responsibility as such surety, says that he is worth the sum of four hundred thousand dollars over and above all his debts or liabilities, of which amount he owns lands in the State of Iowa in his own name of the value of from thirty to forty thousand dollars, and which lands are free and unincumbered.

FRANCIS M. DRAKE.

Subscribed and sworn to before me this 25th day of January, 1883.

[SEAL.] WILLIAM GARNETT, JR.
Notary Public.

63 STATE OF ILLINOIS, } ss:
Kankakee County, }

In the Circuit Court of Kankakee County, Illinois, to the April Term, A. D. 1883.

WILLIAM A. MCGILLIS and JAMES HOGAN, for the Use of John S. Cooper, Trustee,
vs.
WESTERN AIR LINE CONSTRUCTION COMPANY.

Attachment.

STATE OF ILLINOIS, } ss:
Cook County, }

Joel D. Harvey, being first duly sworn, on oath deposes and says that in the above-entitled cause, wherein an attachment was sued out of said court by said plaintiffs, for the use of said Cooper, as trustee, and the said writ of attachment has been levied upon the estate of said Western Air Line Construction Company in said Kankakee county by the sheriff of said Kankakee county; and the said construction company being desirous of having the said property restored to it by giving a bond pursuant to the statute, *and* I, the said Harvey, affiant herein, have signed said bond as surety, and in justification as such surety to said sheriff I do depose and say that I own the following real estate in the State of Illinois, which stands in my name, free and clear of all incumbrances, and that the same is worth the amounts, respectively, as hereinafter stated, viz:

50 x 100 ft. improved, corner 22d St. & Wentworth Ave., worth $10,000; 10 ac. und. ½ of 20, in sect. 15, 39, 13, worth $15,000,
64 Cook county; 8 acres in sect. 8, 39, 13, worth $10,000; 2 acres in sect. 16, 39, 13, worth $2,500; 187,500 par value in West Chicago Land Co., stock estimated worth in cash 70%—say, $125,000.

10,000
15,000
10,000
2,500
———
37,500

J. D. HARVEY.

Subscribed and sworn to before me this 25th day of January, A. D. 1883.

[SEAL.] WILLIAM GARNETT, JR.,
Notary Public.

(Endorsed:) Filed Mar. 27, 1884. J. Frank Leonard, clerk. Filed M'ch 29, 1884. Wm. H. Bradley, clerk.

On the same —, to wit, on the twenty-ninth day of March, 1884, there was filed in said clerk's office an attachment writ, with the return of the sheriff endorsed thereon, from the circuit court of Kankakee county, Illinois; which said writ, together with the endorsement of the sheriff thereon, is in the words and figures following, to wit:

65 *Attachment Writ.*

STATE OF ILLINOIS, }
Kankakee County, } *ss:*

The people of the State of Illinois to the sheriff of Kankakee county, Greeting:

Whereas William A. McGillis and James Hogan, for the use of John S. Cooper, trustee, of the county of Kankakee and State of Illinois, hath complained to J. Frank Leonard, clerk of the circuit court of said Kankakee county, that the Western Air Line Construction Company, a corporation of the State of Iowa, is justly indebted to the said William A. McGillis and James Hogan, as partners under the firm name and style of McGillis & Co., for the use of John S. Cooper, trustee, to the amount of thirty-four thousand eight hundred and ninety-four dollars and seventy cents, and that the said Western Air Line Construction Company does not reside within the State of Illinois and is a resident of Centerville, in the State of Iowa;

And the said William A. McGillis and James Hogan and John S. Cooper having given bond and security according to law;

We therefore command you that you attach so much of the estate, real or personal, of the said Western Air Line Construction Company to be found in your county as shall be of value sufficient to satisfy the said debt and costs according to the said complaint, and such estate so attached in your hands to secure or so to provide that the same may be liable to further proceedings thereupon according to law; and that you summon the said Western Air Line
66 Construction Company to appear and answer the complaint of the said William A. McGillis and James Hogan, partners as aforesaid, for the use of the said John S. Cooper, at a term of said court to be holden at the court-house, in the city of Kankakee, within and for the county of Kankakee aforesaid, on the first Tuesday of April next; that you also summon *and* such other persons as you shall be required by the said —, as garnishee, to be and appear before the said court on the said — day of —— next, then and there to

answer to what may be objected against them, when and where you shall make known to the said court how you have executed this writ, and have you then and there this writ.

Witness J. Frank Leonard, clerk of our said court, and the seal thereof, at his office, in the city of Kankakee, in said Kankakee county, this 18th day of January, A. D. 1883.

[SEAL.] J. FRANK LEONARD, *Clerk.*

STATE OF ILLINOIS, } ss:
Kankakee County, }

I have duly served the within writ of attachment by delivering a copy thereof to D. M. Drake, the president of the Western Air Line Construction Company, this 7th day of March, A. D. 1883.

GEORGE R. LETOURNEAN, *Sheriff.*

Received this attachment writ this eighteenth day of January, A. D. 1883, at 7 o'clock and — minutes p. m.

GEORGE R. LETOURNEAN, *Sheriff.*

STATE OF ILLINOIS, } ss:
Kankakee County, }

By virtue of the within writ of attachment I have levied on
67 about seventy-one hundred and eighty-seven steel T railroad rails, 4 steel railroad crossing frogs, 83 piles of railroad angle splicers, 30 piles of flat railroad splicers, 1 lot of railroad spikes, about 800 kegs; 1 lot of railroad splicers and bolts, about 600 kegs, as the property of said defendant.

This 19th day of January, A. D. 1883.

GEORGE R. LETOURNEAN, *Sheriff.*

STATE OF ILLINOIS, } ss:
Kankakee County, }

The said defendants having given bond according to law, and which bond is herewith returned, together with affidavits of said sureties thereunto attached, *and* I have therefore released unto said company all the above-described detached property.

Dated this 27th day of January, A. D. 1883.

GEORGE R. LETOURNEAN, *Sheriff.*

Services	65
Mileage	1 70
Bond	50
And property	25 00
17 days & nights custodian fee	85 00
Return	10
	$112 95

Endorsed: Filed in the circuit court this 27th day of March, A. D. 1884. J. Frank Leonard, clerk. Bonfield, attorney. Filed M'ch 29, 1884. W. H. Bradley, clerk.

68 Afterwards, to wit, on the thirty-first day of March, in the adjourned March term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon Romanzo Bunn, district judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,
vs.
THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empanneled and sworn, and, after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial be postponed until to-morrow morning.

Afterwards, to wit, on the first day of April, in the adjourned March term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,
vs.
THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

69 Now come again the parties, by their attorneys, and now come also again the jury, in this behalf empaneled and sworn, and, after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial be postponed until to-morrow morning.

Afterwards, to wit, on the second day of April, in the adjourned March term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,
vs.
THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

70 Afterwards, to wit, on the third day of April, in the adjourned March term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,
vs.
THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

Now come again the parties, by their attorneys, and now come also again the jury in this behalf empaneled and sworn, and, after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the fourth day of April, in the adjourned March term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,
vs.
THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

71 Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the fifth day of April, in the adjourned March term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,
vs.
THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hearing

the concluding evidence, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until Monday morning next.

72 Afterwards, to wit, on the seventh day of April, in the adjourned March term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hearing the arguments of the counsel for the parties, the hour of adjournment having arrived, it is ordered that the instructions of the court be postponed until to-morrow morning.

Afterwards, to wit, on the eighth day of April, in the adjourned March term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS and JAMES HOGAN, Who Sue for the Use of John S. Cooper, Trustee,

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

73 Now come again the parties, by their respective attorneys, and now come also the jury in this behalf empaneled and sworn, and after receiving the instructions of the court the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit: We, the jury, find the issues joined for the plaintiffs and assess their damages at seventeen thousand two hundred and ninety-two dollars and sixty-two cents.

And thereupon the defendant, by William C. Goudy, Esq., its attorney, moves the court for a new trial herein.

Afterwards, to wit, on the seventeenth day of October, in the adjourned October term of said court, 1884, in the record of the pro-

ceedings thereof in said entitled cause, before Hon. Romanzo Bunn, district judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

The court, having considered and being now fully advised upon the motion of the defendant heretofore entered herein for a new trial of this cause, sustains the same upon the defendant paying the
74 costs of the trial herein and an attorney's fee of five hundred dollars within twenty days.

Afterwards, to wit, on the twenty-eighth day of October, in the adjourned October term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,

vs.

THE WESTERN AIR LINE CONSTRUCTION CO.

Assumpsit.

It appearing to the court that the five hundred dollars attorney fees and the unpaid costs upon the trial herein under the order entered in this cause on the seventeenth instant have been paid into court, it is thereupon ordered that the verdict heretofore entered herein be set aside and vacated and new trial granted.

75 Afterwards, to wit, on the twenty-eighth day of April, in the adjourned March term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS and JAMES HOGAN, Who Sue for the Use of John S. Cooper, Trustee,

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Now come the parties, by their respective attorneys, and, upon issues joined herein, thereupon comes a jury of good and lawful men, to wit, W. O. Lozier, S. E. Bradley, Isaac H. Fry, Samuel Davison, William P. Gray, Joseph Ellicott, George H. Watts, P. R.

Downey, B. F. Huron, R. H. Austin, R. H. Brentlinger, and C. H. Wood, who were all duly elected, tried, and sworn well and truly to try said issues, and, after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

76 Afterwards, to wit, on the twenty-ninth day of April, in the adjourned March term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,
vs.
THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Now come again the parties, by their attorneys, and now comes also the jury in this behalf empaneled and sworn, and, after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

Afterwards, to wit, on the thirtieth day of April, in the adjourned March term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,
vs.
THE WESTERN AIR LINE CONSTRUCTION COMPANY.

77 Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the first day of May, in the adjourned March term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,
vs.
THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hear-

ing additional evidence, without concluding the same, it is ordered that the further trial of the cause be postponed until Monday morning next.

Afterwards, to wit, on the third day of May, in the adjourned May term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

78 WILLIAM A. MCGILLIS *et al.*, &c.,
vs.
THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hearing the concluding evidence, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

Afterwards, to wit, on the fourth day of May, in the adjourned May term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,
vs.
THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hearing a part of the arguments of the counsel, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

79 Afterwards, to wit, on the fifth day of May, in the adjourned May term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,
vs.
THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hear-

ing the concluding arguments of the counsel, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

Afterwards, to wit, on the sixth day of May, in the adjourned May term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

80 Now come again the parties, by their attorneys, and now comes also the jury in this behalf empaneled and sworn, and after receiving the instructions of the court the jury retired to consider of their verdict, and after a short time the jury returned into court the following verdict, to wit: We, the jury, find the issue for the plaintiffs and assess their damages at twenty-four thousand one hundred and sixty-five dollars and fifty-seven cents.

81 Afterwards, to wit, on the nineteenth day of May, 1886, came the defendant, by its attorneys, and filed in said clerk's office its motion for a new trial in said entitled cause, which said motion is in the words and figures following, to wit:

Motion for New Trial.

UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

In the Circuit Court Thereof.

WILLIAM A. MCGILLIS *et al.*

vs.

WESTERN AIR LINE CONSTRUCTION COMPANY.

And now comes the said defendant, by A. J. Baker, H. K. Wheeler & E. Walker, its attorneys, and moves the court to set aside the verdict of the jury and for a new trial of the above-entitled cause, and assigns the following reasons therefor:

1. The said verdict of the jury is against the law.
2. The said verdict of the jury is against the evidence.
3. The said verdict of the jury is excessive.
4. The said court erred in rejecting proper evidence offered by defendant.
5. The said court erred in admitting evidence objected to by defendant.

ing additional evidence, without concluding the same, it is ordered that the further trial of the cause be postponed until Monday morning next.

Afterwards, to wit, on the third day of May, in the adjourned May term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

78 WILLIAM A. MCGILLIS *et al.*, &c.,

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hearing the concluding evidence, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

Afterwards, to wit, on the fourth day of May, in the adjourned May term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hearing a part of the arguments of the counsel, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

79 Afterwards, to wit, on the fifth day of May, in the adjourned May term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and, after hear-

ing the concluding arguments of the counsel, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until to-morrow morning.

Afterwards, to wit, on the sixth day of May, in the adjourned May term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

WILLIAM A. MCGILLIS *et al.*, &c.,

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

80 Now come again the parties, by their attorneys, and now comes also the jury in this behalf empaneled and sworn, and after receiving the instructions of the court the jury retired to consider of their verdict, and after a short time the jury returned into court the following verdict, to wit: We, the jury, find the issue for the plaintiffs and assess their damages at twenty-four thousand one hundred and sixty-five dollars and fifty-seven cents.

81 Afterwards, to wit, on the nineteenth day of May, 1886, came the defendant, by its attorneys, and filed in said clerk's office its motion for a new trial in said entitled cause, which said motion is in the words and figures following, to wit:

Motion for New Trial.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court Thereof.

WILLIAM A. MCGILLIS *et al.*

vs.

WESTERN AIR LINE CONSTRUCTION COMPANY.

And now comes the said defendant, by A. J. Baker, H. K. Wheeler & E. Walker, its attorneys, and moves the court to set aside the verdict of the jury and for a new trial of the above-entitled cause, and assigns the following reasons therefor:

1. The said verdict of the jury is against the law.
2. The said verdict of the jury is against the evidence.
3. The said verdict of the jury is excessive.
4. The said court erred in rejecting proper evidence offered by defendant.
5. The said court erred in admitting evidence objected to by defendant.

6. The said court erred in admitting over the objection of defendant the evidence of the witness Taylor as to the number of men and teams employed by plaintiffs in the prosecution
82 of their work under the contract.

7. The said court erred in admitting over the objection of the defendant as evidence the opinions of witnesses as — the amount of earth-work that might be performed by each shoveler and team.

8. The said court erred in its charge to the jury.

9. The said court erred in its refusal to charge the jury as requested by the defendant.

A. J. BAKER,
H. K. WHEELER,
E. WALKER,
Attorneys for Def't.

Endorsed: Filed May 19, 1886. Wm. H. Bradley, clerk.

83 Afterwards, to wit, on the fourteenth day of October, in the adjourned October term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

W. A. McGILLIS *et al.*

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendant for a new trial herein, and, after hearing a part of the arguments of the counsel, the hour of adjournment having arrived, it is ordered that the further hearing of said motion be postponed until to-morrow morning.

Afterwards, to wit, on the fifteenth day of October, in the adjourned October term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

W. A. McGILLIS *et al.*

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

84 Now come again the parties, by their attorneys, and after hearing the concluding arguments of the counsel upon the motion of the defendant for a new trial the court takes the same under advisement.

85 Afterwards, to wit, on the twenty-eighth day of October, in the adjourned October term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Judgment.

WILLIAM A. MCGILLIS and JAMES HOGAN, Copartners Doing Business under the Firm Name and Style of McGillis & Co., Who Sue for the Use of John S. Cooper, Trustee,

vs.

WESTERN AIR LINE CONSTRUCTION COMPANY.

Assumpsit.

Now come the parties, by their respective attorneys, and the court having considered and being now fully advised upon the motion of said defendant for a new trial of this cause overrules the same, and, on motion of the plaintiffs, by their attorneys, for judgment upon the verdict herein, it is thereupon considered and adjudged by the court that said plaintiffs, for the use of said John S. Cooper, trustee, do have and recover of said defendant the said sum of twenty-four thousand one hundred and sixty-five dollars and fifty-seven cents, their damages so as aforesaid found by the jury, together with their costs and charges in this behalf expended amounting to the sum of —— dollars and —— cents, and that they have execution therefor.

86 On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record, which said exceptions are in the words and figures following, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois.

WILLIAM A. MCGILLIS *et al.*

vs.

THE WESTERN AIR LINE CONSTRUCTION COMPANY.

Be it remembered that on the trial of the above-entitled cause, at the December term, A. D. 1885, of the circuit court of the United States for the northern district of Illinois, and on, to wit, the 28th, 29th, and 30th days of April, and the 1st, 3rd, 4th, 5th, and 6th days of May, A. D. 1886, before a jury, the Hon. Walter Q. Gresham presiding as judge of said court, the following proceedings took place:

Defendant's counsel stated to the court and jury that the principal issue to be tried was whether the certificate of the defendant's

engineer, given to the plaintiffs in the month of November,
87 1882, for the work done by plaintiffs for the defendant upon the line of railroad in question during the month of October in that year, was fraudulent or not, which statement was acquiesced in by counsel for the plaintiffs.

The plaintiffs, to maintain the issues on their part, offered in evidence the written contract between the plaintiffs and defendant, dated September 6th, A. D. 1882, together with the specifications accompanying the same, a copy of which written contract and specifications accompanying the same was filed with the plaintiffs' declaration in this cause and is copied in the record herein.

The plaintiffs, to further maintain the issues on their part, called as witnesses the following persons, who respectively testified as follows:

William A. McGillis, who testified that he was a contractor and had been engaged in that business about 24 years; that his contracts were principally railroad contracts consisting of grading, bridging, and track-laying; that he had been doing such business for about 22 years on various railroads which he named; that the first he knew about the Indiana, Illinois and Iowa railroad was an advertisement for bids for the construction published in a newspaper in Chicago some time in August, 1882; that he put in a bid for the work; that he did not go over the whole line of the railroad until after he took the contract. McGinnis and Hogan went over part of it and he saw part of it—the east end—at Momence; he saw it also at San Pier. The McGinnis who went with Hogan from Momence east over the road was James McGinnis, who worked for plaintiffs. After witness had taken the contract he went over the entire line.

The general character of the country traversed by the
88 road from Momence to the Kankakee river is level, flat land; some parts are wet. The old grade or line of the Plymouth, Kankakee & Pacific road ran north of the Kankakee river about 18 miles eastward to where it crossed the river at a distance of from a quarter of a mile to three miles from the river. The condition of the old road-bed of the Plymouth, Kankakee & Pacific was not very good. There were some pieces here and there that were in pretty fair condition; other parts were washed out. On some parts of it there was no grade at all, but there was no place where the old bank retained its integrity—that is, as to the slopes and heights; does not know whether the grade of the old line was on the same level as the new grade. On sections 15 and 16 there was none of the old bank there; some of that was washed out. None of it was as high as it had been originally nor up to the grade; there was no part but what had to be raised. Section one commences about 300 yards west of the Chicago & Eastern Illinois railroad. On that section one mile east from Momence it had to be raised from one to three feet. Right at Momence was about the best part of the grade for that mile. There were some washouts in that. They had that partly used as a wagon road. That mile was through a prairie country. From Momence to the Kankakee river, about 18 miles, it is practically a flat country, with very few exceptions. There is a little sand

knoll here and there; is acquainted with and has knowledge of profiles. (Is shown a profile of the road.) The black line on the profile is supposed to be the surface of the ground when the survey is made; represents the irregularities of the surface. The little parallel lines represent the foot, the red line represents the grade line, the top of the bank, so that when the road is built and the ties and superstructure put on the red line would represent the average of the bottom of the tie. The average of the profile showing the
89 fill to be made does not correspond with the actual condition of the old grade as witness saw it. There is more work to be done than is shown on the profile by way of fill or embankment.

DEFENDANT'S COUNSEL: Let me enquire if you are going to put in that evidence?

PLAINTIFFS' COUNSEL: Certainly.

DEFENDANT'S COUNSEL: I object to your proving the profile to be incorrect if you are going to offer it in evidence.

PLAINTIFFS' COUNSEL (to witness): From whom did you get this profile?

A. From Shaw, the chief engineer.

Q. Of the defendant's corporation?

A. Yes, sir.

DEFENDANT'S COUNSEL: My objection is this, your honor: Here is a paper which they call a profile of the entire line as issued by the company. They put that paper in as part of their evidence, and then seek to impeach it by this witness, whom they call as one of the parties to the suit. Let me call your honor's attention to the fact that we are not charged with fraud in furnishing a false profile at all. The whole charge goes to the amount of the certificate. I cannot see at the present time its relevancy.

The COURT: I suppose plaintiffs' counsel is required, now, to show that this measurement of the engineer was not correct, and I understand, under his averment, that it was wilfully incorrect. Now, if he does not show that the measurement was below the amount of work done he fails there. Does this tend to show the amount of work that you actually did there?

PLAINTIFFS' COUNSEL: Yes, your honor; there is no doubt about that.

The COURT: I will let you go on for the present.

To which ruling of the court counsel for defendant then
90 and there duly excepted.

The WITNESS: In section one of the profile would show an average, I suppose, of about a foot of filling. Some of it is above grade and some a little over a foot. I suppose the average would be about a foot on section number one. To get the track to the grade we would have to raise it, on an average, about a foot. As a matter of fact the bank was raised over section one an average of about two and a half feet on the whole section of embankment. On section 2 the profile shows on two places where there was a washout

and fill of three feet, and shows the balance of an average fill of hardly a foot. In one washout was a small cut of about 100 feet. The real depth of the washouts was about four feet. They were washed away below the old surface. There was about 300 feet in all of the washouts. On section three the profile does not show any fill at all, except in two places about 150 feet, where it shows a fill, and in two places where there is a little creek. The balance don't show any fill at all. The fact was there was some of that section that was very near grade in spots, but it was very narrow, and we had to widen it out on each side. There were some spots of it that were pretty near grade that we did not have to fill. There was a little cut in section three that was shown on the profile about a foot. The witness does not know the number of yards they took out of the cut, but it was more than is shown on the profile. Section 4 by the profile shows very near grade on the whole section. The fact was that some of it was above grade and some of it below grade, and we had a cut on that section. It was a sand cut right on the road; the road went through it—the wagon road. The wagon road was on the old road-bed. We had to take some out of that cut; out of the bottom of it. It was wide enough for the road-bed there, if I recollect. The profile shows that cut very little above grade; about
91 two-tenths of a foot. As a matter of fact it was more than that; we had to cut more than two-tenths of a foot; the exact amount I do not remember, but I suppose possibly 18 inches, to the best of my recollection, but I am not certain; we had to excavate that out to bring that down to a level with the grade. Section 5 by the profile is shown to have sixteen spans of filling; the balance of the section shows very near grade all the way. As a matter of fact it was not grade by any means. There were some parts of it which was very near grade, but it was narrow—too narrow for a team to go on; we had to fill it on both sides. There was some parts of it—a few places that was very near grade, but there was none of it to grade; that is my recollection of section 5. Section 6 shows on the profile to be above grade, and in parts, I should say about five or six-tenths, to be low in some places, and there is a trestle there of eight spans over Bull creek; it shows a little below grade; about half of it by the profile shows to be above grade, and the other a little below grade—about two-tenths. There was a good deal more than that under grade; we had to put in considerable; we had to raise that and widen it out. On section seven the profile shows grade all the way but a small distance at the west end and a little bit of a fill at the east end; it shows grade all the balance. As a matter of fact that was just like the balance. We had to raise all that and widen it out on some parts of it, save where it was burrowed out with what we call wolf holes. These wolf holes were where some animals had undermined the old bank, so that when you would drive a team on it it would break and sink down; it was burrowed under. The old bank was in that condition from section seven to section fourteen, where there was any old grade at all. On some portions of it there was not any old grade. On some parts of section 8 there was
92 no old grade; half of that section had no grade at all. On

the east end of section 8 the profile shows a fill, a small fill, and the rest shows very near grade. Don't remember how much we had to raise, as a matter of fact; hadn't been over that part of the road as much as the other. Am pretty familiar with sections 11 and 12. We had to do more work on them than the profile shows, considerably more. The profile shows on section 11 that the bank was pretty near grade. There was an opening at Sugar creek in sections 11 and 12. We had a good deal of figuring on that, and there was one actual cut on it. I do not see it shown on the profile. There was a little filling to be done in addition to what the profile shows. On section 13 there was a little cut not shown on the profile, according to my recollections. On section 14 there is a cut. The profile shows a couple of fills, and then the balance to grade until it gets near the east end, and there is a little cut there about a foot for about 200 feet. Witness' recollection is that the cut is about five feet. At the end of section 14 is where Mr. Singleton's sections commenced.

PLAINTIFFS' COUNSEL: You have got along to sections 15 and 16. Now, you may state what arrangement you made with reference to Singleton doing that work and when you made it. Just state the circumstances in your own way.

Objected to by counsel for defendant.

The COURT (to plaintiffs' counsel): What do you propose to show now?

PLAINTIFFS' COUNSEL: I propose to show that Mr. McGillis, with the consent of Gen. Singleton, who represents the land through there, and with the consent and by arrangement with Mr. Shaw, chief engineer, and also Gen. Drake, the president of the construction company, did two sections of work; that Singleton did two sections of work for McGillis & Co. Most of it—to the extent of
93 a great many thousand yards—was completed by the first day of November, and for which Mr. Shaw, the chief engineer, gave us no estimate for the October work, and when complained of by McGillis refused to give us any estimate therefor. In other words, that, by the consent of Shaw and Drake, McGillis made a subcontract with Singleton, or rather the Momence Live Stock and Farming Company, to do this work for him, McGillis, and that Shaw, after setting stakes for the work and telling McGillis to go on and do the work, refused to allow them anything for it.

The COURT (to defendant's counsel): You take the position that they are not entitled to that because written consent was not on the contract, do you?

DEFENDANT'S COUNSEL: Not for that reason alone, your honor. Plaintiffs' counsel has stated, if I understand him, what he expects to prove. I wish to bring the attention of the court, in making these objections, to the facts, as we suppose, this witness will testify to and other witnesses on the part of the plaintiffs, for the purpose of showing that this contractor or the construction company or the chief engineer, neither of them, had the right to make the contract which they claim McGillis did make with Singleton, as the agent of

the Momence Live Stock and Farming Company or some other corporation.

The COURT: I will let the testimony in at the present time, subject to your objections.

DEFENDANT'S COUNSEL: We object to any proof of any special contract being made, except it be shown to have been made by the written consent of the engineer, as required by the contract between these parties.

To which ruling of the court counsel for defendant then and there duly excepted.

94 The WITNESS: In September Singleton made an offer to do the work on sections 15 and 16 on the old grade for $3,000. Singleton is manager of the Momence Farming and Live Stock Company.

The COURT (to plaintiffs' counsel): Do you expect to prove that this construction company consented to this?

PLAINTIFFS' COUNSEL: Certainly.

The COURT: Go on.

The WITNESS: We agreed he should do that work for $3,000 on the old grade, and afterwards I met Mr. Singleton and he showed me how he could shorten that road and better it by taking this ditched line that he had thrown out—the bank that he was making with a dredge for a ditch, and he wanted me to see Mr. Shaw and talk with him about it. The new line would straighten the old grading and make it a shorter and straighter line. The old line was in a kind of a bend (indicating) and the new line come on it and straighten that and make it shorter and straighter. I spoke to Shaw about it and told him that Singleton wanted to see him with reference to making this change. Shaw went over with me to Singleton, and we came out over the new, proposed road, and Shaw thought that was an improvement. He said he would go and see Gen. Drake. Before they went I told him I didn't know what change they would make, but I would pay Mr. Singleton the same amount I would pay him if he was going on the old line on this contract I had with Mr. Singleton, and they went to Chicago to see Mr. Drake to get his consent. I saw them, I think it was, the next day; met Mr. Shaw. He told me they made the change and they were going on the new line, and he went over a few days afterwards and then the engineers had their centre slope stakes right on the new line where it straightened the old one. The new line, at the furthest or widest part of the bend, was about 1,500 feet from the old line.

95 The old and new lines both ran through a wet, marshy country. Singleton told witness that the Momence Live Stock and Farming Company owned the land. Singleton went on, I think, in the last days of September and worked on it all through the month of October, and the first of November I was over there with Singleton and looked over what he had done, and he claimed that he had two-thirds of the work done, and I thought he was correct. I had told Shaw about the contract with Singleton to do the two miles of old grading before the line was changed; that was in the

latter part of September. Shaw said that he thought it was a good idea for me to get a dredge to do that work. Singleton went to work on sections 15 and 16 about the last days of September; neither the construction company nor Singleton nor the chief engineer made any complaint with reference to the work being done by Singleton when he changed the line.

I let Allison have a contract for twenty miles of the work. With reference to the other part of the work, not let to Allison, I commenced at Momence on the 14th of September; hired teams and men, got tools, and commenced to put men on every section; had bridging to do and the track-laying; bought all the bridge timber and made an arrangement for the piling; bought all my bolts, washers, and all the iron-work I wanted, and had it delivered for the whole contract; did not sub-contract any of the timber-work to Allison & Company—just the grubbing, clearing, and grading; came up to Chicago and made an arrangement with employment agencies for men, and we were to get men just as fast as we could arrange and get work for them; had a big force of men and teams on it.

PLAINTIFFS' COUNSEL: By the first of October how many men and teams did you have on the 22 sections that had not been sub-contracted?

DEFENDANT'S COUNSEL: I object to their proving the number of men or the number of teams that worked on that road during the month of October. I suppose you will follow it up as you did before and ask how much earth one man ought to handle during a day, and upon that proposition we shall want to be heard and offer some authorities.

96

The COURT (to plaintiffs' counsel): What do you propose to prove by the witness?

PLAINTIFFS' COUNSEL: I propose to prove by the witness that he, in accordance with that contract, went to work with all the men and teams that the law would require him——

The COURT: Provided himself with means to perform his part?

PLAINTIFFS' COUNSEL: Yes, sir; and that he did perform —, and that he was going on with that reasonable force required and with the number of men and teams, and so forth, to do this work as the contract required.

DEFENDANT'S COUNSEL: My objection goes further; that it does not tend to enlighten the jury at all as to the amount of work that was actually done during the month of October or September whether he had a hundred men or two hundred men.

The COURT: I will let him answer this question and hear your authorities to-morrow morning.

The WITNESS: I had about a hundred teams and 275 men.

The further examination of the witness adjourned to Thursday, April 29th, at 10 o'clock a. m.

On the 6th of September, 1882, when witness took the contract, the centre stakes were set on the line of the road. The centre stake was

in the centre of the grade, where the track is going to be after the grade is made, and the height of the bank, as it will be when completed, is usually marked on the stake, or, if a cut, the depth of the cut.

97 The marking is done in feet and tenths of a foot. The slope stakes were set shortly after we took the contract and set as the work was done. The slope stake is set at the base or toe of the bank or grade on each side of the embankment where the base is going to be. In addition, there are stakes set called plus stakes. If the ground is even every one hundred feet there would be station stakes, and if the ground was very uneven they would put stakes between them and notice the difference in the level of the ground between the stakes. We commenced work at Momence by direction of Henry Shaw, the engineer. During the months of September and October most of our force were engaged between Momence and the Kankakee river, the first eighteen miles eastward from Momence. The most of the work done during those months was from section 1 to section 8. There was work done on section 9 to a considerable amount. The track was laid from Momence eastward about four miles by the first of November. The track was laid just beyond the sand pit in section 4. Dirt was taken out of that sand pit and put under the track all the way from the sand pit back to Momence. We thought we had the road-bed completed when we laid the track from Momence to the sand pit. We had it at what the grade was marked—the grade stakes on the station—and after we got the track down they commenced to raise the track and we had to haul this dirt and put it under the track. They had the track raised from six inches to a foot and a half after the track was laid. It was a distance of about four miles that the track was raised from six inches to a foot and a half. It was raised according to the stakes which the engineer set to raise it. Those were not the first stakes, but they were the second stakes—new stakes. It was along the line of the road while these men were at work; think I

98 am familiar enough with railroad construction to arrive at the fair, reasonable, and accurate amount of work that the men of the kind we had there would do—that one man would do in shovelling—in a day. The character of the work to be done was principally sand and some black soil on top of the sand; think I know enough about that work to state what would be the average that a team and scraper did per day.

He is asked about what average in number of yards the shovellers and also the teams with scrapers did per day.

Question objected to on the grounds that it is not the best evidence, but in the nature of secondary evidence, and because the plaintiffs are required to offer the best evidence in the case that can be offered and that is within their reach or power, and that it being conceded that the evidence of the engineers who made the measurements is the best evidence under the rule it is submitted that plaintiffs have no right to offer this evidence in support of what they themselves admit to be the best evidence in the case and which is within their reach.

The COURT: The more orderly way in a thing of this kind would be—you say you are introducing this in support of your evidence when it comes in—I think the better way would be to show your measurements and then support it afterwards. As I said yesterday, where there is a contest in a thing of this kind either party may support his measurements by the introduction of facts which tend to show its correctness, and the weight of it is a question for the jury.

Question withdrawn.

We received estimates from the chief engineer for the work done; the first for September. (Witness identifies the September
99 estimate.) Mr. Shaw handed me that estimate about the 3rd or 4th of October. The next estimate was delivered about the 10th of November.

Witness identifies the October estimate, which was introduced in evidence and which was in the words and figures following:

100 *Western Air Line Construction Company, Building the Ind., Ills. & Iowa R. R.*

Monthly estimate of work done and material furnished up to Nov. 1st, 1882, by W. A. McGillis & Co., contractors.

	Graduation.					
	Acres clearing.		Sta's grubbing.		Earth-work.	Cu. y'ds.
Section.	This mo.	Total.	This mo.	Total.	This mo.	Total.
1						2,777
2					682	4,680
3					2,144	2,264
4					1,488	1,488
5					846	2,053
6					2,255	2,255
7	0.7	0.7			998	1,248
8					367	367
11					1,346	1,346
12					1,822	2,140
13					1,015	1,015
14					1,440	1,440
15						304
17					309	309
18					1,748	1,748
20					103	103
21					983	983
22					108	108
26	1.2	1.2	3.0	3.0	934	934
27	3.5	3.5	12.5	12.5	1,640	1,640
28	2.1	2.1	14.0	14.0	1,568	1,568
29	4.8	4.8	6.0	6.0	2,975	2,975
30	1.2	1.2	2.8	2.8	1,580	1,580
31	1.8	1.8	2.5	2.5	750	750
32	0.5	0.5			340	340
33	0.9	0.9	2.0	2.0	860	860

Western Air Line Construction Company, Building—(Continued).

Section.	Graduation.					
	Acres clearing.		Sta's grubbing.		Earth-work.	Cu. y'ds.
	This mo.	Total.	This mo.	Total.	This mo.	Total.
34	6.4	6.4	11.0	11.0	2,140	2,140
35	6.9	6.9	3.0	3.0	1,860	1,860
36	2.0	2.0	2.0	2.0	226	226
37	2.3	2.3	1.5	1.5	660	660
38	0.2	0.2	----	----	880	880
39	2.8	2.8	2.0	2.0	1,031	1,031
40	3.0	3.0	5.0	5.0	2,072	2,072
42	----	----	----	----	1,240	1,240
43	0.2	0.2	----	----	690	690
44	6.7	6.7	2.5	2.5	1,160	1,160
45	3.7	3.7	4.0	4.0	930	930
46	2.6	2.6	4.5	4.5	1,872	1,875
Total	53.5	53.5	78.3	78.3	43,062	52,036

I hereby certify that the above estimate is correct.
(Signed) O. C. WHITSELL,
Ass't Engineer.

101 *Western Air Line Construction Company, Building the Ind., Ills. & Iowa R. R.*

Monthly estimate of work done and materials furnished up to Nov. 1st, 1882, by W. A. McGillis —, contractors.

Section.	Bridging & timber-work, iron bolts, spikes, &c.					
	Piles, lineal ft.		M, B. M.		Lbs.	
	This mo.	Total.	This mo.	Total.	This mo.	Total.
1	----	----	10,956	11,628	387	387
2	----	----	19,784	19,784	982	982
3	272	272	6,224	6,224	289	289
4	1,193	1,193	18,780	18,780	816	816
Total	1,465	1,465	55,744	56,416	2,474	2,474

I hereby certify that the above estimate is correct.
(Signed) O. C. WHITSELL,
Ass't Engineer.

102 In the October estimate the engineer allowed us for doing excavation or embankment, or both, on thirty-eight sections a total of 43,062 cubic yards for the month of October and for September and October 52,036. The October estimate was delivered to me by Thomas Hogan, in our employ. On the 9th of November I took it and went to Kankakee and saw Mr. Shaw. I told Mr. Shaw that the estimate was handed to me by Mr. Hogan and it was not half enough. He said he expected it was not half enough himself, but that was all he could do about it, and I told him it would not pay our bills—the money that was coming to us—and he said he could not do any more about it; I had better see Gen. Drake. I asked him where Gen. Drake was, and he said he left for New York that morning. I waited then until James Hogan, my partner, came from the East and told him the situation. We kept on working until the 14th of November, when we stopped work; served written notices upon the chief engineer and upon the construction company. (Witness identifies the notices.) They were served on the 18th of November on Mr. Shaw and on Mr. Shontz, superintendent of the construction company; was present when they were served.

Counsel for plaintiffs stated that it had been agreed between counsel that so far as serving notice for the production of originals it might be waived on both sides.

Written notice offered in evidence.

Defendant's counsel object to their introduction upon the ground that witness' evidence was that plaintiffs abandoned the work on the 14th of November, and that notice was served on the company on the 18th of November, four days afterwards. One of said notices is in the words and figures following:

103 "To the engineer of Western Air Line Construction Co.

"DEAR SIR: Please take notice that we have done work and furnished materials in compliance with our contract with the 'Western Air Line Construction Company,' said contract, dated September 6th, 1882, largely exceeding any estimates we have received for the same, and we hereby request and demand that you furnish us a just, honest, and correct certificate for that work, in compliance with the duty imposed on you by said contract. We are ready and willing to proceed at once with the performance and completion of our said contract if we can receive a fair estimate and payment of what we are already entitled to, but if that is refused us it will be entirely impossible for us to finish our said contract.

"WILLIAM A. McGILLIS,
"JAMES HOGAN,
"*Composing the Firm of McGillis & Co.*

"Served by J. Hogan on November 18th, 1882."

Was present when the above notice was handed to Mr. Shaw. He said that we got all that we were entitled to. He would not do anything further.

The other notice introduced in evidence is in the words and figures following:

104 "To the Western Air Line Construction Company.

"GENTLEMEN: In conformity with the terms of our contract with you, dated September 6th, 1882, we have done a large amount of work and furnished a large amount of materials thereunder, but have only received certificates or payments for a small portion thereof.

"We are ready and willing to proceed at once with the performance and completion of our said contract if we can receive anything like a fair estimate and payment of what we are already entitled to under the contract, but if this is refused us it will be utterly impossible for us to finish our said contract.

"Your engineer had neglected and refused to furnish us the certificate to which we are entitled, and we therefore request and demand of you payment of the amount due us under the contract.

"W. A. McGILLIS,
"JAMES HOGAN,
"*Composing the Firm of W. A. McGillis & Co.*"

Served by J. Hogan on Nov. 18th, 1882.

Was present when the above notice was served on Mr. Shontz; think he said he could not do anything in the matter; that it was in the hands of the engineer, who attended to that part of it. At the time the notices were served we were prepared to go on with the work if we had got proper certificates. Part of the men quit on the 14th of November; they did not all quit. Most of the men were along the line of the road still on the 18th of November, when the notices were served. We received a notice from the engineer. My recollection is that it was received on the same day that we served the other notices and at the same time.

105 We never received any response, except what Shaw and Shontz said as stated above, except in the notice given us by Shaw.

Counsel for plaintiffs read the paper in evidence in the words and figures following:

"To William A. McGillis & James Hogan:

"You are notified that you have not a sufficient force of men and teams at work on that portion of the I., I., I. R. R. described in your contract with this company to complete this road within the time mentioned in your contract, and that, in the judgment of the chief engineer, there are just grounds of apprehension that the work will not be completed in the manner and within the time specified in your contract; and that the grounds or reasons why said engineer apprehends said work will not be completed as per contract are that at the present time a very small force, if any, of men and teams are at work on said road; that all or nearly all of your force have stopped work, and that the country over which said bed is located

is a wet and marshy road; that the same may soon become so wet as to prevent work; that it is late in the season and the grading of said road-bed may soon be stopped by frost; and you are notified, on or by Monday, the 20th day of November, 1882, to put a force of teams at work on said road as follows:

"On graduation, 100 teams and 125 men; on timber-work, three power pile-drivers, with necessary force to keep the same running, and a bridge gang of 20 men; on track-laying, *alling*, surfacing, and filling, 150 men.

"Kankakee, Ill., Nov. 16, 1882.

"WESTERN AIR LINE CONSTRUCTION COMPANY,

"By T. P. SHONTZ, *Superintendent*."

106 In my complaint to Shaw about the November estimate I told him there was section 9, where we had done a good deal of work, and we had no estimate at all on it, and where we had laid track we had no estimate on that at all and we were short all over. Shaw said that he could not do anything until he saw Gen. Drake, and that I had better see Gen. Drake. He had gone to New York that morning and didn't get back until after we stopped work. I saw him about a week after we stopped work; commenced laying track from Momence eastward about the middle of October; am not certain to the day; it was somewhere about the middle of October.

Cross-examination:

We started work on the 14th September. Before that we made contracts for timber and getting in tools and hiring men and teams to go to work; had all the contracts for bridge timber made during the month of September, made contracts for piling during that month; made the contract for iron with Crerar, Adams & Co. The iron was bolts, washers, spikes, and such material of that; did not go over the entire line of road prior to the making of the contract; went over part of it to St. Pierre; went over very little of it; don't know as I went over one section of it; made the contract without going over any of the sections entire; went on the work in pursuance of bids for the contracts.

The engineer authorized the change in sections 15 and 16 in the early part of October or the last of September. The Stock Farm Company were digging a wide ditch running east and west alongside of the old road-bed or right of way. When I first went upon the two sections I think the ditch was dug along the whole line of the road on those sections—that is, the machine had gone through it. This was before I had a conversation with Sin-
107 gleton. The grading adopted was earth thrown out of the ditch. Early in October the engineer had cross-sectioned the work on the two sections. About the last of September or the first of October there was an understanding between Shaw and myself as to the change of line and the adoption of the new grade. Afterwards I saw Gen. Drake. There was no agreement made be-

tween Gen. Drake and myself. I don't think that question came up. I understood from him then that he knew all about it, in the course of the conversation, and that he assented to it. I think he told me that Singleton was dissatisfied about the amount of the grade; that they were raising the grade on him, and he said something about the right of way. I could not tell you what he said about that, but I recollect now that he said something about the right of way; think he mentioned some dissatisfaction about the right of way; don't know anything about whether a contract was made with Singleton about that right of way until January, 1883. Singleton was to do the work on the two sections for the sum of $3,000.

When Shaw and he were talking about this arrangement I told them I didn't care what arrangement they made about new grade or the new line, but I would pay Singleton the $3,000 to make it satisfactory to Mr. Shaw, the same as if he went on the old grade. It was my understanding that the land belonging to the Momence Live Stock and Farming Company, of which Singleton was general manager. Singleton so told me. Singleton executed no writing with me at all; he made no transfer to Drake or Shaw or myself of the grade or right of way to the company, to my knowledge, meant to say that we had 100 teams and 275 men on the road during October, scattered along the entire line, some doing one kind of work and some doing another. The grade was changed in sections 1 to 4, inclusive, after we laid the railroad iron in the work.

108 The grading was done up to the grade that was put on the grade stakes before the track was laid; first went upon the line about the 12th or 13th of September, before there was any work; likely went the next day; was down there every week, mostly every day, back and forth; cannot give the exact dates when I went on the line of the work; was on those sections pretty often; was not there every day; time taken up with general matters, but had general supervision of the work. It was under the direction of our foremen. Occasionally I went over the line.

Witness is asked whether he ever went over the line for the purpose of ascertaining whether the profile was accurate or inaccurate, and replies that he went over the line to see its condition before the work was commenced, and from information then received the profile was inaccurate, according to his judgment; took a casual survey of it; was one day in going from Momence to the crossing of the Kankakee river, about sixteen miles, and two days going over the balance of the road; have no knowledge of the condition of the line except what I derived from walking over it; think I went over the entire line in November; never went over it after we stopped work; don't remember whether I went over it before the 10th of November or not; went over to see how many men and teams were there, and whether we had force enough to complete the work within the time; did not lay all the rails upon the first four sections for the purpose of hauling the sand from the pit upon the road-bed; got the sand out first upon the right of way on the four sections by laying the track to the sand from Momence east; did not lay the track substantially on the old grade that was there. We filled with

scrapers and teams along the side of some of those four sections, not on the entire four sections; some we hauled with wagons; could not tell whether there is now any evidence on the four sec-
109 tions that we took the fill from the sides of the track and from the right of way of the company, because I haven't been over it since. On the last of October the four sections were principally all finished—that is, the grade part; was there during the time the track was laid, back and forth; made examination of part of the line to ascertain whether the road-bed was graded up to the marks upon the centre stakes or not. There was a very small portion of those four sections where the old grade was smoothed off and the ties laid upon the sods that were then upon the road; that was about a quarter of section 3. It was high enough to lay track on it, but it was narrow and we had to widen it off. We hauled dirt to widen it by the cars; it was not near wide enough, and it was not quite high enough. We got the sand to make the grade upon four sections on the side of the road, and some we hauled with a wagon out of a small cut on section 3; could not tell whether — got it inside or outside the right of way; could not tell what portion was filled by wagons; have a recollection of how much of the work was done, because I considered it was all done; know how much work was required to do only as the profiles and specifications showed; called on Mr. Shaw with the October certificate on the 10th of November; received it from Hogan, brother of my partner; he was foreman of part of the work. Hogan, my partner, is in Virginia now; he lived in Massachusetts at the time. He was on the work but very little of the time. He came first upon the work in October. He did not have charge of any part of the work or the purchase or transportation of supplies; was not over the work done by Allison in October; think I was over it in November, when I went over the entire line to see what was needed. Besides the work sublet to Allison, there were three sections on the other side of the river, 23, 24, and 25, sublet. Sections 22 to 46, inclusive, were sublet; suppose
110 I went through and examined the October estimates the night of the day I got it; had before me a memorandum of the time of the men, all the foremen's books, the time of the teams, and the profiles that they gave me; had no knowledge then of the amount of work that had been done east of section 22, only what some of Allison's men told me they had done.

Witness is asked by defendant's counsel to state again the exact language he used and the reply that Shaw made to him, as near as he can remember, when he went to Shaw with the October estimate. He answers:

"I told Shaw that I got the October estimate from Mr. Hogan, and that, according to my idea of it, there was not half enough. I pointed out to him wherein it was deficient or defective in some parts; that section 9 was omitted entirely from the estimate, and sections 15 and 16, that there was no estimate given at all for them. On section 9 all the work that had been done altogether was done in October. I don't know what has been done since on section 9. I don't think I could state how much earth-work was done on it, in the

month of October, now. I think I could do it then; could not state now how many men were employed upon that section; have not looked over the time book since; and, speaking of the condition of the work as it was when I went over it about the first of November—it was about the 9th of November—I don't know what particular day, of my own knowledge. I don't know the exact condition of the work on the 31st of October, but I do from reports that had been made by my foremen; have not examined those reports or time books lately. I looked over them at that time, and used to look over them every week; looked over them at the time the certificate came in, and kept taking the time off every week. The foremen made weekly reports to the office of the number of men employed. Those men were employed by the day, and the teams were employed by the day, except a few men that had station work. When I pointed
111 out to Shaw wherein the certificate was defective he said that was all he could do about it; I would have to see Mr. Drake if there was any change made in it; did not have two conversations with Shaw; did not see Shaw at Momence the 14th of November.

Witness is asked by defendant's counsel whether he has given all Shaw said when he called his attention to the defective certificates, and answers:

No; that was when I told you I got the estimate. I said it was not half enough. He said he expected it would be twice as much, but he said that was all he could do about it. That was as it was given in to me. I suppose he meant by the division engineers—I understood from him that he had no knowledge of the matter except from reports made to him and measurements made to him as returned by his assistant engineers.

That was all that occurred between the witness and Shaw that day.

Drew the money on the certificate that day, amounting to something over $10,000; went from Shaw's office with the check and drew the money out of the bank; left the money on deposit in the bank; put the check in and got credit on it. On the 12th of November went to Chicago; drew out a part of the money on the 14th and part of it checked out before that.

On objection being made to the cross-examination by plaintiffs' counsel, counsel for the defendant stated that he proposed to show by witness that he drew $11,000, or whatever the amount of the certificate was, out of the bank, and, instead of applying it to the indebtednes which he owed to his men and — supplies, he failed to do that and abandoned the work of his own accord, carrying the money with him.

Counsel for plaintiffs withdraw all objection with the assertion that the statement was false; that there was not a particle of evidence of that kind, and that the plaintiffs' books were there.

112 The COURT: The evidence is not competent, but as the objection is withdrawn he may answer.

DEFENDANT'S COUNSEL: Where did you go on the 14th, and who went with you?

A. I took Mr. Hogan down with the money to Momence on the 14th and he was to go out on the line to pay the men. I was to come up here and see Mr. Cooper and see what steps we were going to take with reference to this contract and to state my case to him. He was not at home the first time I came up here. Mr. Hogan paid the men. I had paid part of them before that. The men that were coming in had orders. I gave them checks on the bank. Those were the men that had quit in the meantime. Some of the money was left in the bank. After the train left I drove him down and came up here to see Mr. Cooper; have no knowledge of what occurred at Momence on the 14th, only as I was told. Hogan went on paying. I don't know whether the men were ever discharged or not. We quit work on the 14th and commenced paying the men. The men were on the line of work on the 16th. After the 14th I was not at Momence or on the line; know that the men were there only from hearsay. I know we could get other men to go on with the work if we could not get the men that were on the line. We were ready to go ahead whether or no; have never been on the line after the 14th. I was not on the line on the 14th; have not been on the line since the 9th or 10th. My impression is I got the notice from Shaw, the engineer, on the 18th when I got back to my office. I don't think a notice was served on me before our notices of the 18th were prepared. Our notices that we served were prepared in Cooper, Packard & Gurley's office, here in Chicago, on the 17th of November. They were prepared on the 17th, and I took them down and they were served on the 18th.

113 Redirect examination:

Prior to the time we quit work and made contracts for all the timber, the iron bolts, and most of the piling, all but the bridge ties, and the material was coming right along as we were using it at the time we stopped work. All the money we got from the defendant was used in the payment of the men on the line of the road, and more, too; did not make any measurements on the line of the road at either of the times I went over it; did not go over it before I took the contract. Hogan told me he went over it, and also McGinnis.

114 WILLIAM F. SINGLETON, a witness for plaintiffs, testified, among other things, as follows:

I was dealing in real estate and was general manager of the Momence Live Stock and Farming Company; was dredging and had done some railroad work; a good deal of ditching. In the year 1870 or '71 I made a large part of the old grade used by the Indiana, Illinois and Iowa railroad from Momence to the crossing of the Kankakee river. From the State line about seven miles east

from Momence, through to the Kankakee river, the Momence Live Stock & Farming Company owned the land through which the railroad was built a distance of about ten miles in Indiana and about two and three-fourths miles in Illinois. In sections 15 and 16 of the railroad the land on either side is a low marsh, overflowed from the Kankakee river. In the year 1882 I had in operation one or two steam dredges digging ditches 20 feet wide and five feet deep with a view to the reclamation of those marsh lands; had my first interview with McGillis and Hogan, the plaintiffs, and James McGinnis, their foreman. No definite arrangement was made for me to do the grading of sections 15 and 16. There was a definite arrangement made later, between the 4th and 15th of October.

Witness is asked to state what that arrangement was.

Counsel for defendant objected; objection overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

My recollection of the arrangement is that I was to have 20 cents a yard for work, and the line was to be changed. That was in the first conversation. It had been agreed that the line should be changed so as to make a straight line and make it conform to the line of the ditch that had already been made, giving me the advantage of the work I had already done, the earth thrown
115 out in making the ditch. General Drake was a party to the arrangement; think I saw him upon the 4th of October at the Grand Pacific Hotel, at Chicago. I told him these parties wanted me to undertake the work, and I was not willing to undertake it unless I could get the advantage of the work already done in making the line. This line was very much preferable to the old line. It was shorter and straighter. Drake said he was willing to agree to the change of the line provided he could get the right of way of the new line. We already had the right of way or a contract for right of way, and it would not cost more on the new line than on the old one. I told him that the distance was shorter and the line straighter. It would be a saving to him to have it on the new line. (Witness draws a diagram of the old line showing the bend and the new line straightening the road.) The ditch struck the line of road from the north, turned to the west, and, running in a straight line, again struck the old line about three-quarters of a mile west. The arc between the circle made by the old line and the ditch was about 200 or 250 feet. That was the bend of the road. The ditch is almost perfectly straight.

Q. About how much did you shorten the line by doing that?

Which question was objected to by counsel for defendant as immaterial; which objection was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

(Witness answers:) I don't know; it is shortened quite a little. The value of the land on the old grade was greater—that is, the in-

jury to the land by a crooked grade like that is more than the injury by a straight line.

Counsel for defendant objected to the answer as immaterial and moved that it be stricken out; which objection and motion were overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

(Witness continued:) That is one reason why I wanted a
116 change made in the grade. It was a mistake in the engineering; the old grade had almost an elbow there. For the Momence Live Stock & Farming Company, witness gave the railroad company and construction company the right to change the line through there and straighten the road in the month of October. Prior to the 4th of October the ditch was dug through there; all that part of it was finished and the arrangement that was made was to adopt that as part of the line of the road through the three-quarters of a mile where the bend in the road was straightened. In the month of October the grading was done through the three-quarters of a mile, straightening the bend, and half a mile further west, and ready for the November estimate, and with reference to the entire amount I considered that I had, on the first day of November, 1882, about three-quarters of the work done on the whole two sections. After McGillis & Co. quit I made a contract with General Drake to complete and turn over the entire work on the two sections for $5,000; the contract was in writing. (The contract referred to was produced by counsel. Counsel for plaintiffs introduced it in evidence.)

117 The stakes were set, changing the location of the road where the bend was straightened, on the first of October, 1882, and there was a change made in the height of the grade from a foot to a foot and eleven inches on those two sections above the grade as shown by the stakes which were there when I made the arrangement with McGillis. I objected very strenuously to the change. The stakes were set after my agreement with McGillis, but before it had been passed upon and before I had seen General Drake.

Cross-examination:

When I made the agreement with McGillis it was the understanding that I should see General Drake before it was concluded. In the conversation between Drake and me relative to the change of right of way he made two conditions.: One was that he should have the right of way on the new line without any additional cost. I was in a position to assure him upon that point. The other condition was that it should not cost him more on the new line than on the old. The title for the new right of way would have to come from the president of our company, Charles W. Cass, in New York; he would have to sign it. Cass and myself had corresponded about the matter, and we were anxious to have a change of grade made. The title of the right of way was in our corporation—the one of which I

was manager. Drake required the conveyance of the new right of way to the railroad company; it was not procured in the month of October; the deed was made after the first of January, 1883. General Drake did not require a tripartite contract between our company, the construction company, and McGillis and Hogan. The title of the real estate was in the Lake Agricultural Company and the Momence Live Stock & Farming Company, but the two companies are substantially the same parties, but different corporations, both operated by the same name.

118 Redirect examination:

The title which the construction company or the Indiana, Illinois & Iowa Railroad Company had to the right of way before was contained in a contract made by General Cass with the Plymouth, Kankakee & Pacific railroad, by which he agreed to make ten miles of grading and donate the right of way that had never been consummated by actual conveyance.

JAMES C. DEVOR, a witness for plaintiffs, testified as follows:

Am a civil engineer, and have had about 19 years' experience in railroads, mostly as division engineer of the Pan Handle and of the Indiana, Bloomington & Western and other roads. About fifteen years of my experience has been as an engineer in connection with the location and superintending the construction of roads and building and locating the lines; made a survey or measurement of the Indiana, Illinois & Iowa railroad, from Momence to North Judson, for the plaintiffs, commencing on the first day of January, 1883. My force consisted of A. W. Nelson, L. R. Taylor, and myself. Nelson was a civil engineer, and Taylor had done some work for me, under my supervision, as engineer, previous to that, and had been in the employ of McGillis & Co.

Found on part of the road the earth-work completed, some partially done, and some places nothing done. Measured the new work that had been done; did not measure all the new work, but omitted that which Taylor said had been done by parties after McGillis & Co. quit. I do not remember about any stakes being set marking where McGillis & Co. quit. Taylor noted the places. I undertook to measure what McGillis & Co. have done, as told by Taylor;
119 don't know of any means to ascertain the amount of earth-work done on the road, known to engineering skill, other than those we took to ascertain the amount of the earth-work done by McGillis & Co; commenced the work at Momence; have forgotten how long we were engaged in it. In ascertaining the amount of earth-work I measured the distance and the width and the height; did it as carefully as I could do it, so as to get at the exact quantities done by the parties. Some of the timber work I believe I measured, and I think some grubbing and clearing, I think I recollect. There was some of that measured, I think, also. We took as a mean the bottom of the road-bed—the bottom of the

work for the original surface. Sometimes we found some stakes set; could tell by the earth-work what was new and what was old. Where we found slope stakes set at the outer edge of the bank on either side we took as a mean level the original surface, which was right at the bottom of the slope stake. We measured these by 100-foot stations, and sometimes we took intermediate cross-sections. After we got through we made up a statement as to the amount.

Witness identifies the paper shown him as the estimate of the amount of work that he measured. It was based on the measurements I made and actually took in the field. I made the calculations, but the writing was done by Mr. Nelson, my assistant. I believe it to be correct. According to the measurements we took the total amount of earth-work on the line of 46 miles of road done by McGillis & Co., as the same was measured by me and pointed out by Mr. Taylor, was 210,144 cubic yards. In making the measurement, on the theory that the bottom of the bank on either side at the foot of the slope stakes was the average level, the average height that we took as a basis would have been absolutely correct if — was level clear across. In the case of a cut, where there had been an old cut made by the old company I measured the height and
120 width of that to ascertain how much of that earth had been taken out. I did not measure the whole cut, but just where the slope stakes stood, and if not, where they had cut to. I could distinguish the old from the new by the appearance of the ground.

Witness is asked, upon the supposition that there had been an old bank that stood there for a period of eleven years, on an average, washed out in places entirely, and in all places the integrity of the old bank in its shape and form had been destroyed, leaving in some places little cones, and in other places the rain had washed it out entirely, and in some places it had flattened out, whether, as an engineer, he could come at the amount of new earth-work done there on the whole line, as it was within 50,000 cubic yards, and answers, "Yes, I should think so." He is asked whether he could come any nearer than that to it. He answers, "I think I can get closer than that." He is asked to give, in his opinion, how near he could come to the actual amount of new work done, and answers, "Well, I should think, within fifteen or twenty thousand yards." In making my measurements I did my best to get near to the amount of earth-work done, and assuming that Taylor told truly where McGillis had done work, in my judgment I came within fifteen or twenty thousand yards of the actual quantity; saw part of the line where the old grade had been untouched. I don't remember how much, and paid but very little attention to any other work than the work I had to do. In making measurements we made what is called "field notes."

(Witness identifies the book of field notes.) It shows the cross-sections and the height of the bank, the depth of the cuts on each side, as well as the width, station by station.

Book and statement offered in evidence by plaintiffs' counsel.

The amount of embankment and excavation as shown by said book of field notes and the calculations therein upon each section, respectively, was and is in the words and figures following:

No. of section.	Embankment.	Excavation.
	Cubic Y'ds.	*Cubic Y'ds.*
1		14,361
2		15,941
3	2,650	15,530
4	16,865	5,982
5	26	6,112
6		6,369
7		13,352
8	18	2,588
9		5,273
10		
11		4,343
12		4,415
13		2,913
14	173	1,203
15		8,764
16		3,224
17		2,267
18		6,289
19		
20		2,966
21	2,422	2,268
22	1,719	2,469
23		89
24		
25		
26	1,781	1,881
27	831	3,218
28	269	3,594
29	5,297	1,609
122 30	1,676	3,120
31		1,821
32	568	767
33		1,824
34	2,903	3,084
35	1,684	2,219
36		416
37		1,831
38	132	940
39	248	458
40	1,430	1,169
41	958	1,268
42	71	2,796

No. of section.	Embankment.	Excavation.
	Cubic Y'ds.	*Cubic Y'ds.*
43	166	1,636
44	1,628	656
45	750	1,671
46	572	1,637
"Y" at Momence		974
Total	44,837	165,307 = 210,144 cu. y'ds.

The profiles were offered in evidence by plaintiffs' counsel, and on one of them the respective amounts of excavation and embankment in cubic yards marked thereon for sections 1 to 23 were as follows:

123 Section.	Excavation.	Embankment.
1	15	3,356
2	2	5,718
3	301	3,842
4	838	928
5	175	2,846
6	62	4,675
7	30	3,640
8	466	1,032
9	180	2,235
10	35	1,153
11	83	1,923
12		3,523
13	245	3,227
14	937	3,693
15		7,982
16		10,508
17	20	2,268
18	6	4,553
19		12,500
20	36	3,234
21	2,577	792
22	1,057	2,104
23	2,742	2,794

124 The amount of timber in place was 71,408 feet, board measure; the timber delivered, but not in place, 5,244 feet; piles driven, 4,250 lineal feet, according to the bills shown by Mr.

Taylor; piles delivered, but not driven, 96 lineal feet, I have estimated that at. The clearing was 83.39 acres. That included the grubbing. I find on the paper 4,484 lbs. of bridge bolts. I have forgotten about that. I don't remember anything about that now; did not make any enquiry before we commenced the measurement for the original cross-section notes; have forgotten whether we had the profiles from McGillis & Co.

Profiles introduced in evidence by plaintiffs' counsel.

Cross-examination:

Don't remember how far we were out on the road making measurements before the snow fell; remember there was snow when we got through. On the first four sections we measured all the dirt that was there in place and assumed that McGillis & Co. had put in all of that; think there was a small cut on section 3; measured the cut the same as we did the other work, the length, width, and depth; don't remember whether there was any section stakes in it. The large cut, I did not measure all of it. I don't remember how much we did not measure. We measured as much of it as our book shows, and assume that McGillis & Co. had done all that work. The book assumes it. If the book shows that we measured a cut that was in places 6 or 7 feet deep and 25 feet wide we assume that McGillis & Co. did that work, and that makes part of the calculation. Referring to book in section 3, it appears I measured 2,650 cubic yards of excavation. I find in the book that the average height of the cut in one place was three and eight-tenths feet, in another three and four-tenths of a foot, then four and a half feet, and one and a half feet. In section four I measured 16,864
125 cubic yards of excavation. By the book it appears to have been a borrow pit that I measured. It was something outside of the prism of the road, and I think it includes that which was within the prism of the road. I see it is in places 70, 80, 90 feet in width; in some places it is as high as 5 feet; six and a half feet is the highest center level there; all that entered into our calculation as work done by McGillis & Co.

Witness is asked by defendant's counsel, in any place where there had been an old bank and it had been covered up by new work, whether it was utterly impossible to tell how much old work there had been under that bank, and answers: "Yes; where it was covered with new work we could not tell anything about it." He is asked whether he found some of those places, and answers: "I don't know whether there was any under the new work or not." He is asked whether where snow is on the ground he could tell which was new and which was old work, except in those places where Taylor would scrape it off and tell where the commencement was, and answers that he did not remember about the snow much; knows there was snow on the ground when he got to North Judson; but it appeared to him there was none when they started out, but he is not very clear on that. If there was snow there we would certainly have to scrape it away before we could see; don't remember now whether on his

former examination he testified there was about four inches of snow after the third or fourth day out; that he was out ten days; if he did testify to it on the former trial it would be true, because his memory was clearer then than it is now. In all the balance of the cuts, where there had been new work done, we measured them just as we found them, and, if pointed out by Taylor as the whole having been done by McGillis & Co., we measured the whole. There were some places where there was new work done that I did not measure, where some parties were working on it at the time.

126 We had no means to ascertain how much had been done before McGillis & Co. commenced. I measured that with our chains and our measuring rod, which was twelve feet, and with that I got the levels and got the height and the depth; when it was extra wide I used a tape line. Part of the work performed by me was carrying the front end of the chain and the level rod. Mr. Nelson carried the measuring rod and Taylor carried the rear end of the chain. Mr. Nelson kept the accounts and made the field notes. This 210,144 cubic yards is the result of our entire measurement, counting in all these cuts and all these embankments just as we measured them. I don't know how much of that work McGillis & Co. did and how much was old work. I gave McGillis & Co. credit for the amount of new work that was done, and sometimes I found & cut where they had just cleared out the bottom, and I measured just that and not the entire cut. What I mean by saying that in a cut where work had been done before the plaintiffs went on to work at all is that I measured it by the stakes. If there were any which showed where the new work had got to I could distinguish that from the old, and from that point I took my measurement. Perhaps there was some old work that had been taken out of there before, and I didn't give the plaintiffs credit for that. In the cuts I gave them credit for all the work that the book shows. If in a cut, say, 6 feet in depth I found evidence of new work having been done three feet high, then I assumed that they had done three feet out of that entire cut right through so far as that work was done. If in a cut it showed on each side of the embankment that they had commenced cutting down their three feet up I took the cross-section on each side to see where they commenced. I did not intend to say that in a cut 6 feet deep where 3 feet had been excavated and the plaintiffs excavated 3 feet more that I gave them credit for 6 feet of excavation.

127 Witness is shown by defendant's counsel a diagram of a cut and asked to state where on the sides of the cut there had been new work done, whether he made his center height on a level with the beginning of the new work and assumed that the plaintiffs had taken out the entire cut from the top of the center height on a line with the new work done on either side of the bank, and answers that he did so assume and could tell whether the plaintiffs had taken it out of the center or not. If there had been a wash-out in the center witness gave the plaintiffs credit for the excavation as if they had done it.

Redirect examination:

Did not measure the air quantities, as they are called in the contract; did not measure the old part and the new part together in the cut; tried from all the information given by Mr. Taylor and the indications on the ground to ascertain all the work that McGillis & Co. had done.

128 ARTHUR W. NELSON, a witness for plaintiff, testified, among other things, as follows:

Am a civil engineer; have been such since 1871, and as such have been engaged in the construction of railroads (naming different roads he had been employed upon); was employed in January, 1883, to make measurements of the Indiana Division of the Indiana, Illinois and Iowa railroad as a part of Capt. Devor's force. I endeavored to make a measurement of the quantity of work that had been done by McGillis & Hogan on the line of road from Momence, Illinois, to North Judson, Illinois. We took the ordinary methods to do it; took a 100-foot engineer's chain and measured the lineal distance with the level rod and level; measured the embankment and excavation, the height, depth, and width; assisted in the calculation of the quantities arrived at in the field. Those quantities are in the book of field notes put in evidence, in which I made quotations in the field, and they were correct. The summary or calculation made from the field notes are in my handwriting. (Identifies the paper.) The result of the measurements in the field were correctly transcribed in the statement and the calculations from the field notes were accurately made. Occasionally we run across a piece of the old bank along the line of the road that had not been covered up.

Witness is asked in what condition it was.

Objected to by counsel for defendant; which objection was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

Witness answers he did not pay much attention to that; just went over it; some places it had holes in it—a good deal of it. It was not in any shape for a railroad embankment or wagon road or anything of that nature. In some places it would have a cone in the
129 center. In some places it would be washed out. In some places it would be burrowed out with some kind of animal's holes. The snow spoken of in the testimony as having fallen during our measurements I think overtook us about two miles west of the Kankakee river. The snow was three or four inches deep and wet. It did not interfere with our measurements. It was very easy to get at the ground. We scraped off the snow and then we could get at the original surface of the ground. We could easily see the original surface, and we took our observations from that; don't remember whether it snowed the entire trip; know there was snow at North Judson when we quit; would not be positive as to the length of time we were engaged in the field, but think about ten or

twelve days. In measuring cuts we were governed a good deal by the information we received from Mr. Taylor in regard to who had done it. He had made a note of it. If it was all old work of course we did not measure it; don't believe I could give an opinion of the number of actual cubic yards arrived at by us with reference to the actual amount of work done by McGillis & Co.; know of no other method than the one taken by us to arrive at the quantity in the old bank; did not allow the plaintiffs for the entire amount of dirt taken out of the cuts; allowed them for the amount, less something which had already been done. We ascertained what had already been done by the indications of the other work that had been moved over; took the appearance of the bank. Occasionally we came to the slope stakes which had been set there by the engineer of the I., I. & I. Railroad Company. We used both the appearance of the ground and the slope stakes where we found them. We found the stakes occasionally. We measured from the stakes. In case of a fill the slope stakes are more frequently set at the toe of the
130 bank on either side, and in that case we took the main level of the bottom from the foot of the stake on one side to the foot of the stake on the other side; don't remember about bridge timber in place and the bolts. Capt. Devor and Mr. Taylor made those measurements.

Cross-examination:

Have testified once before in the case on the former trial. All the data I had to ascertain where McGillis & Co. had done work was what Mr. Taylor told us. He would indicate where their work commenced. The course we pursued was in the case of a fill of half a mile. Taylor pointed out where McGillis worked and where they quit, and we would measure from one point to the other. Capt. Devor scraped off the snow at the end of every hundred feet. Then we could see whether there was new dirt or not. If the earth had been put there in October and had laid until January, and the rain and snow upon it, it was an easy matter to tell where the new dirt was from the appearance at that time of the year, and between the hundred-feet stations we did not have any data to go by as to how much McGillis & Co. had put on there and how much was old dirt, unless there was some inequality in the surface, which necessitated an observation at those points; could not tell how much cone had been there, where we found new earth over the whole fill running over it; assumed McGillis & Co did all the work from that point to the toe of the slope stake, and measured it as if they had done it all.

If we came to a cut where Taylor told us they had done that we did not measure the entire cut, only in cases where the cut was all new; don't remember whether we found any cut where the work was all new or not. It is almost too far back to remember whether there were all new cuts. There was one place where they had a construction train in the cut that we did not measure the full
131 width of that cut. We measured the width, as shown on the notes, some of it 80 feet and some 90, and we measured the

full height of the cut; could not tell where the cut was that we measured the full height of it. On the former trial I might have answered: "We measured the cuts to McGillis just as we found them," but it was not my intention to answer that way; I misunderstood it. On the former trial I answered: "We did not know the situation of the surface of the embankment only as we could tell from either side. I had no knowledge of the old work, and so we measured that work as we found it." On the former trial I did not answer: "We measured the excavations as we found them, as though McGillis did it all." That was misunderstood. I did not measure it that way all the way through. The only one I can recollect that we did not measure that way is where this construction train is; think that is the only one we did not measure that way; did not mean to say that the other ones were measured that way, but that we measured them according to the indications we found in the cuts—the indications of the new work and the slope stakes that had been set by the engineer. If we found a slope stake in a cut or evidence of new dirt being taken half way up a cut, then we took the cross-section from another cut and measured it as if the whole had been taken out by McGillis; did not attempt to ascertain whether some dirt washed down or not, and they got credit for it as if that much solid dirt had been taken out of there. We had no method of ascertaining what amount of earth-work was under those old embankments. I don't know of any other way by which this work could have been measured. If we had had the cross-section notes of the road-bed made before any work was done on it we could measure it more accurately and could have made a closer calculation on it, if the
132 cross-section notes were correct. I don't know whether any effort was made to get the cross-section notes. I did not go to the engineer or to any officers of the construction company and ask them for them. I made the field-notes. Whatever depth they show that was the amount which we measured up to the plaintiffs, and all the side elevations in the notes are just as we took the observations. We found the side stakes standing. They corresponded to where the new work appeared to have commenced in the cuts. There was not any difference between them where the side stakes stood and the appearance of the new work. The slope stakes were set at the edge of the new work in every instance.

Those slope stakes corresponded with the commencement of new work in places where we found the slope stakes. I don't know who set those slope stakes, whether the company's engineers or Mr. Taylor.

Redirect examination:

The stakes had the appearance of being regular slope stakes, set there by an engineer. They have marked on them, in red figures, the cut or fill. We compared those figures with ours to take the level at the stake, and they compared very closely. Before we went out on the line of the road we made our headquarters at Kankakee for two days; that was the headquarters of the construction company; did not see Mr. Shaw during that time; had some inkling

that there was trouble between McGillis & Co. and the construction company, but no positive knowledge. It was generally known along the line of the road that we were at work surveying there.

Q. Did or not the construction company or Mr. Shaw, the chief engineer, or any one on the other side, offer you the field-notes for your guidance?

Which question was objected to by counsel for defendant;
133 which objection was overruled by the court, to which ruling of the court counsel for defendant then and there duly excepted.

A. Not to me nor to any one else, so far as I know.

(The evidence of the witness to the effect that he made no effort to get the cross-section notes from the construction company was brought out by the questions of defendant's counsel.)

In the case of an embankment where we found the slope stakes standing they compared very closely with our measurements the same as in the cuts.

DEFENDANT'S COUNSEL: You did not tell any of the officers of the railroad or construction company what you were measuring that ground for, did you?

A. I didn't know any of the officers of the construction company at that time. I did not tell them before we went out on the road or while we were out on the road what we were there for.

L. R. TAYLOR, a witness for the plaintiffs, testified, among other things, as follows:

Am a civil engineer and have been engaged as such and in the construction of railroads continuously since 1878; was engaged on the Indiana, Illinois and Iowa railroad merely as clerk and bookkeeper for plaintiffs; had general charge of overlooking and overseeing it, and had charge of the books and accounts all the time; was employed about September 14th or 15th, 1882; went over part of the road occasionally; was not east of the Kankakee river until January, 1883; went over the road from Momence half way to the river about the 16th or 17th of September, 1882. At that time I found a few center stakes or line stakes occasionally and a
134 few slope stakes which designate the width of the road at the base. McGillis & Co. did the work directly without subcontracting it to other parties on sections 1 to 7, parts of sections 8 and 9, I think all of sections 13 and 14, all sections 17 and 18, and the eastern end of 19 and the western end of 20. The road crosses the Kankakee river towards the eastern end of section 18, and section 19 begins in the Kankakee river. While Allison & Co. were at work on sections 26 to 46, inclusive, I had nothing to do with that work. On sections 1 to 15, inclusive, and sections 17, 18, and 19 my duties were to receive the time of the men as reported to me by the foremen once a week in the time books in which they kept the time of each man, the laborers separately and the teamsters separately, and then they took out another time book for the following week,

and from the time books I made my general register, a transcription of the time so reported. There was a few days' work done on sections 1 and 2 when I first went over that part of the road, very little remaining of the old bank on those sections at that time in some places. In other places it was quite a bank of a few feet, but no berme. It was simply in the form of a ridge, and the water had washed it down from the center of the former grade and carried it away, or else thrown the dirt from the old grade out and destroyed it and removed any sign of any berme. A berme is the distance between the foot of the embankment and the ditch. The ditches were in places partially filled with earth. In other places they were capable of holding water in the form of ponds or puddles. About the 16th or 17th of September I passed over eight or nine miles of the road, not continuously, but saw portions of every section. It was impossible to pass over the whole of it, because it was dangerous for a team and we were there with a horse and buggy. It was overgrown with the sod, which was seemingly strong and firm, but burrowed out by some animals, and anything heavy, a horse and
135 team passing over it, would crush through it. There were places where there was a wagon-road crossing that had been used for a short distance, and we passed over such portions as that. The old bank was burrowed out from the big sand pit in section 4, almost continuously to section 15. A new bank had to be built almost entirely. In September, October, and November I was over the road between Kankakee and Momence about three times, maybe four times, and the first three or four sections a greater number of times. On the 14th of September some grading had been done on section 1 and a beginning made on section 2. The men were burrowing the earth from the side of the road. I think I was along there three or four, maybe half a dozen, times. At that time I don't think there were any grade stakes set there. In the latter part of September or fore part of October about half of the work had been laid out as far as sections 3 and 4, up to the big sand pit, and some grade stakes were placed—what I understood were grade-stakes; don't recollect seeing any grade stakes there before to conform to the grade stakes — required additional earth to be put upon the bank; remember about McGillis & Co. quitting work. Within a very few days after that I went over the road, from what is called Big Bull creek, for the purpose of noting the distance that the track had been laid and the amount of work that had been done. I made a memorandum of it for the time being for my own use, from which I made a report. From section 15 to Momence, after McGillis & Co. quit, I had made the notation, and I knew, substantially, where McGillis & Co had done work when they quit. That part of section 15 I saw afterwards when I passed over again on foot. That was about the 23rd or 24th of November, 1882. I knew from the reports in the office of the plaintiffs where their men were working
on certain sections, as the work was being done, by reason of
136 being clerk in charge of that duty in the office, and having those reports come to me officially from our foremen. They gave me a knowledge of the work that was being done on cer-

tain sections every day, and our general foreman also reported to me every night, or at any rate every time he came into town. In the latter part of the week preceding the 14th of November had been over part of the work. There were portions of the old bank between Momence and section 15 here and there that were entirely gone, and then a small ridge would be left for a short distance. The dirt would be washed away again or worn away entirely. That occurred probably once or twice in every station. Sometimes there would be two or three consecutive stations with but a single wash in it, and then two or three consecutive stations that were entirely gone, so that the average would make once or twice in every consecutive hundred feet or station that there was no bank left; accompanied Capt. Devor and Mr. Nelson in their measurement of the road; helped to carry the chain—what is called rear chainman; designated to Devor and Nelson the points where we had done work and where we had not performed any work on the roadway; also in regard to the bridging and track-laying. In the case of a cut we did not measure all of that cut. We did not allow for all of it. We only took what we thought was our just due, in my judgment. We chained it off in hundred-feet stations; then set*ting* up the rod at the toe of the bank on either side of the road-bed; then on top of the road-bed on what we thought was a fair estimate of the original surface as we had found it before we had done any work on that; then a rod reading was taken at that point and a general average was struck on the two rod readings at the two points, including also the height in the centre, which gave us a general prismoid of a regular form. We determined at what point of the bank the point commenced by the general appearance of the ground as we found it at that
137 time. The general appearance would be indicated sometimes by the grass or weeds that were still remaining at the sides, which showed where the fill had begun, if it was a fill—that is, in a new fill or a new embankment. In a cut we had to take the original surface as we found it on top of the bank; then the centre depth, showing that the general average of the three cross-sections or the three rod-reading levels—what was a medium cut or an average cut through. We did not measure the cuts as though McGillis & Co. had taken out the entire cut in all cases. We did not do it in the big sand cut, because there had been a portion of the cut there before. My recollection is that McGillis & Co. only got credit for a portion of the cut; have forgotten how that was determined upon. I knew only in a general way the amount of earth taken out of the cut from the amount of teams we had at work and from the number of men that were at work daily. I also relied upon my observation of the ground itself while the work was being done. I stated those things I knew to Devor and Nelson, and we made the measurements accordingly. The time of the men engaged in the graduation was kept distinct from the time of the men engaged in track-laying and surfacing; also the time of the men with teams was kept distinct from laborers. This was upon sections from 1 to 14, inclusive, and from 17 to 22.

Witness is asked the total number of days' work done by the shovelers on that part of the road not sublet by the plaintiffs.

Objected to by counsel for defendant.

The COURT: I think that is a very vague way of getting at the number of cubic yards of excavation.

PLAINTIFFS' COUNSEL: I do, too, but shall follow it up with evidence.

The COURT: It depends on so many things—the character
138 of the ground, and so forth. I will let this go in, subject to the objection of the other side.

To which ruling of the court counsel for defendant then and there duly excepted.

DEFENDANT'S COUNSEL: There is another objection. This witness was a clerk in the office, and the only information he has is obtained from the books.

The COURT: Then you had better have the record, if you have it.

PLAINTIFFS' COUNSEL: We have the records, and I will bring them in.

On sections 15 and 16, done by Singleton, and on the eastern sections, done by Allison & Co., we had to guide us in making our measurements the information of parties along the road who had assisted some of them as foremen and some of them who had been laborers from the beginning of the work by Singleton or Allison, who went along with us. We depended altogether on their information on those sections. The construction company did not do any work on those sections contracted to Allison & Co. after McGillis & Co. quit work up to the time of the measurements.

Cross-examination:

My office as book-keeper for McGillis & Co. was in Momence. Sections 1 to 4, inclusive, were reasonably dry ground. After the 14th of September went over the road to view the general condition of the ground from which the road-bed was to be made. McGinnis, our foreman of construction, went with me. The old road-bed from Momence eastward could not be continuously followed by the eye, but in places you could do it, and then by the eye connect them by straight lines, presuming that the road-bed would run through in a straight line.

There were but two cuts, in my recollection, that we reached
139 on that tour, and they were only partially made. They had indications of having been filled up by sand washing down to the bottom. My impression would have been that the whole line gave indications of having been graded for a superstructure years ago. I concluded that the cuts, as I viewed them that day, had been filled up; made no measurements or written memoranda when I went over the road on the 14th of September. If I had known the grade lines I could have formed an engineer's judgment of the amount of excavation and filling that then remained on the line, but without the grade line I could not.

The line was susceptible of being accurately measured on September 14; had no direct charge of the construction of the road or the supervision of any of the gangs of men; had an indirect supervision of the whole work inside and outside of the office. My advice and instructions to the foremen—I assumed to direct the construction of the work—where the men should work and how they should work. After the 15th of October I went over the line for the purpose of observing the amount of work that was done at several different times. On the 15th of October I went over the line in assisting to pay off the men; was over different parts of it after the 15th of October, but not continuously, and, speaking now just from recollection, plaintiff McGillis and his counsel directed me to go with the engineers, Devor and Nelson, to assist them. We left Momence on the 1st of January, 1883. I had continuously remained at Momence from the 14th of November until January. The information I furnished to Nelson and Devor as to the extent of the work that had been done by McGillis & Co. and the character of the old work was by definitely located points. After the work had been abandoned I went over it to note certain points in regard to work McGillis & Co. had performed, and I noted certain particular points; had no personal knowledge on the 31st of October of the condition of the work that I now recollect; was examined as a witness in this case two years ago; have read my evidence taken then. I may have testified on that trial that — making the measurements we did not have the cross-section notes of the original surface and knew nothing about the original elevations, as we did not have the cross-section notes. I don't recollect of having given that evidence. I did testify that when Nelson, Devor, and I made the measurements the old embankments were covered up. I don't think part of my testimony was that "We did not know how much of it was under any of those banks we measured." As to the statement, "We measured the whole bank as we found it; we simply measured over the places where McGillis & Co. had worked," as to the latter clause, I did so testify. I believe that we only measured where McGillis & Co. had worked. I don't recollect of having testified to the first part, namely, "We measured the whole bank as we found it;" don't recollect to have testified that "in the cuts we took the whole cut into consideration as we found it, without calculating how much of the cut had been made before McGillis & Co. took the contract." If I testified so then my recollection was as fresh and reliable as at present; don't think I testified on the former trial that "the cut in section 4, 1,400 feet long, of which I have testified, was computed in this way," because I had nothing to do with the computation of that matter. I did not help to make the computation. I assisted in pointing out how the measurement should be made, but Mr. Nelson and Mr. Devor made those computations. I directed where they should commence the measurement. They upon their own judgment determined how much of that measurement they should make, asking me simply for information of about how much work McGillis & Co. had performed; where it begun and where it ended. I think I have not sworn that

of two that was not; there was very little but what was up to grade. After the track was laid on sections one, two, and three there were additional grade stakes set requiring an additional fill of from 6 inches to a foot; could not tell exactly. I think a foot in some of them. At the time the track was laid through the sand pit in section 3 the cut was down to grade, and after the track was raised, if I remember right, the cut was filled in again. There were additional stakes put in the cut; there was some part of section 4 raised; don't know just how much or at how many points. The filling of from 6 inches to a foot and a half in sections one, two, and three after the track was laid was done by the gravel train, material taken out of the sand pits. Thomas Hogan had charge of that work. On the first of November all the sections from one to fourteen, except section 10, had work done on them. In section 10 the country was very wet; almost impossible to get anything from the sides. They proposed to finish it with a gravel train when the track was laid on it in places where it was too bad to put track on. The grade was
fit to lay the track on up to section 9. There was a little of sec-
145 tions 6 and 7, I think, that was high enough, but not quite
high enough where material was hard to get. They raised the grade on us at a great many points, on mostly every section, from an inch to a foot. From sections one to fifteen should say that Singleton, when we quit work, on the 14th, had three-quarters of the work done on sections 15 and 16. Before the work was let — went to the office of defendant, at Kankakee, and made an examination of the profiles. There was a profile there showing cuts and fills; compared the profiles with the actual condition of the country to some extent. The profile was incorrect as to section 5. Sections 12, 13, and 14 did not show as much work as was actually to be done. In section 14 there were some places where the fill was required to be 6 or 8 feet and the profile would indicate from two to three feet. There were some parts of section 13 that would take from four to five feet to put it to the grade the track was laid on. About the middle of section 13 there is a fill of about 125 to 150 feet represented on the profile which is not accurate. A man could not cross at that place; we had to put logs on it to get across on. On section 12 the ground was low and soft in places, where there would be required three or four feet—some places more; they are not shown on the profile. A man would not think, to look at the profile, that it would require so much fill. There were some very bad washouts on section 5. There is a washout indicated on the profile, but not as much as there really was; that was at Bull creek, where the water was running through. It was also washed away considerable at Trim creek.

Cross-examination:

Had charge of the whole 25 miles. We did work on 23 miles.
I had charge of the grading; had a sub-contract, but did not do
any work on it except a day or a day and a half; particu-
146 larly examined the grade of the new bed before the laying of
the rails on sections one to four; did not have charge of

laying the iron; Hogan had charge of that. I did the grading and brought it up to the grade stakes that were given me by the engineers; put it in shape for the work; went over the road, representing McGillis and Hogan, after the contract was let; had the profile with me; looked over the profile and compared it with the work to be done. I say that the profile is inaccurate from section to section, in my opinion; don't know the exact amount of fill that was required in the construction of the road under the requirements of the profile. It differed from the profile in more than half a mile. I don't know for how much of the distance it differed. I am not an engineer; was foreman of the construction gang; have no interest in the suit. The work was continued upon those twenty-six sections until the middle of November. Work was done upon the line after that time. I did some five or six sections of the work for the company; had a contract after the plaintiffs quit. The contract was in writing. I performed it on four sections; understand that Allison & Co. kept their men at work after the 15th of November; don't know of my knowledge. The grade was not substantially done all the way through and completed after the first of January. The work was not constantly progressing on the line of the road until after the first of January with a full force of men and teams and train, to my knowledge. There was not much force on the upper end. I don't know a great deal, only on one mile, besides what I had. I don't know how much work was done upon the road after the first of November until the completion of the grading.

147 THOMAS HOGAN, a witness called for plaintiffs, testified, among other things, as follows:

My business is railroad contracting; have been engaged in the business over 20 years; brother of one of the plaintiffs; went first on the road in question from the first to the 13th of October, 1882; was there in the place of my brother to look over the work generally and where I could be of the most advantage; looked over the bridge-work chiefly and track-laying. When I first went on the road the first two sections were pretty well graded. We had a general track-man. I was there with the track-layers a good deal. The track was laid a mile or more when I got there on section one. There were subgrade stakes set when I got there. When the track was laid on section two it was up to grade, with the exception of five or six hundred feet. We laid the track on that without it being up to grade. Section three was up to grade when we laid the track on it. Section four was all graded as far as we laid the track. Sections one, two, three, and four were up to grade before the track was laid, with the exception of five or six hundred feet in section two. The track was afterwards raised by direction of the chief engineer; they set stakes for us; am satisfied that when I first saw section one it was up to grade. The whole grade was raised from sections three and four back to Momence. The raise would average a foot on the first section and from a foot to a foot and a half on the second and third sections.

I complained to O. C. Whitsell, one of the assistant engineers, of the track being raised in that way, having to be raised up to that grade when we only had one grade. He said he was carrying out his orders from the chief engineer. We got the dirt to raise the grade from section four in the big sand cut.

Q. How long were the men engaged in hauling that dirt
148 from there back over those sections, one, two, and three; about how long?

Objected to by counsel for defendant as immaterial; which objection was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

A. Oh, three weeks or more.

Q. How much of a force was there?

Which question was objected to by counsel for defendant; which objection was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

A. There was about 60 men.

The COURT (to plaintiffs' counsel): Do you propose to show how many men you had at work there and how much each man would do in a day?

PLAINTIFFS' COUNSEL: Yes, sir.

DEFENDANT'S COUNSEL: That is what we object to.

The COURT: I don't think the court could exclude it, perhaps, from the jury. It was pretty uncertain evidence, though, I think. Go on.

To which ruling of the court counsel for defendant then and there duly excepted.

The WITNESS: When I say 60 men I mean 60 men loading on the cars. We have some 20 or 30 men on the track lifting and shoveling off the dirt. I left the work when McGillis & Co. quit, I think about the 14th or 15th of November. On the 14th or 15th of November, when plaintiffs quit work, they had on the work west of the Kankakee river somewhere about 200 or 250 men. While I was on the work there were five pile bridges fully finished.

Defendant's counsel states that in regard to the timber in place defendant's engineers estimated it to the time that plaintiffs
149 quit; that it was 75,000 and some feet, and Mr. Devor estimated it 71,000 and some feet.

Cross-examination:

Have no particular charge of any part of the work further than looking after the bridges and track-laying; did not employ any of the men; had something to do with discharging them; was looking after the bridging to a great extent; had charge of the track-laying to a great extent. Mr. Gannon was the boss of the track-laying. McGinnis was general foreman of the grading; was on the road when the track was laid over part of section two and sections

three and four. The track was laid under my personal observation on those sections; did not have anything to say about the track-laying when it was going on all right. There were grade stakes standing when the track was laid and left standing. If there are any grade stakes in the centre they are not left there when the track is laid. They were not left there in this case. They were left there when we commenced to grade. As soon as they were in our way we moved them; always do if the stakes are in our way. I know that the grade was up to the grade stakes as indicated by them when the track was laid. The grade was raised after the track was laid, but not under my directions. I could not state exactly the time when they commenced raising the grade; it was in the latter part of October, from the 20 to the 25th of October, I should judge. I know how many men were engaged in the work of raising the grade from general observation, being over it; didn't keep the time of the men; had nothing to do with the pay-rolls that were made out for the men. I used to keep a run of the number of men. I don't take to be very accurate in the statement as to the number of men employed and giving it from my best remembrance and impression. A portion of them were engaged in surfacing the track and ballasting.

150 DAVID ANTHONY, a witness for plaintiffs, testified, among other things, as follows:

Have been engaged in railroad construction 16 or 17 years; went on the line of the road in question on the 12th or 13th of September; was a foreman of the grading gang; went over the road as far up as the Kankakee river before any dirt was put upon it, the day we commenced. Some parts of the old grade was pretty fair; some very bad; some you could not get through. I was wading in water to the arms, with two or three men I took along with me. There was some parts of the old line where there was no bank at all, nothing but water. Where the old bank remained it was pretty well dug out in holes; some animals had been working in under it. Where it was not undermined it was not in shape to put the track on; it was too narrow. Some parts of it were pretty fair and some very narrow—three or four feet wide some parts, and some parts was pretty good; taking it as an average it was all very narrow on top. Where I worked no part of the old bank was up to grade.

Witness is asked how many men he had under him.

Which question was objected to by counsel for defendant; which objection was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

A. I had eight or ten men; sometimes more and sometimes less; commenced work on sections 1 and 2; then I went to 13 and 14; worked there until about the 14th or 15th of November.

Witness is asked by plaintiffs' counsel whether he could determine with reasonable exactness the average number of cubic yards that his men did a day.

Objected to by counsel for defendant.

The COURT (to witness): Can you answer that question;
151 can you tell how many cubic yards a man will shovel a day?

A. Yes, sir.

Q. Do you think you know from your own experience the capacity of a man?

A. Yes, sir.

PLAINTIFFS' COUNSEL: You mean by that in that kind of earth that your men did?

A. Yes, sir.

The COURT: What enables you to judge?

A. I can judge it by reason of the way the material is handled. It was not loose clay material at all, but it was a sort of loamy dirt and sod. I should judge by the stakes working ahead what a man was putting in a day by measurement. I could form my judgment because I have handled a good deal of that kind of work, and from my experience have had grading contracts of my own. In taking a contract of that kind the number of cubic yards a man will average a day in that kind of material that is to be moved enters into the calculation.

Witness is asked by plaintiffs' counsel whether he could arrive at a reasonable exact statement of what the average number of yards was teams and scrapers did in a day in that work done by witness, and answers that he could, and that a team would put in fifty yards a day.

Objected to by counsel for defendant.

Witness is asked by the court how he can determine it, what enables him to base a judgment upon it, and he answers: "Five scraper loads make a yard. I can count the scrapers every hour. That is the way I figured on it. Five scrapers No. 3 make a yard of dirt. You count how many scrapers you put in in an hour. That is the way you can get at it; that is the way you can figure it. The foreman figures it.

Q. How much, in your judgment, did your men do on an average a day—the shovelers?

Which question was objected to by counsel for defendant;
152 which objection was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

Witness answers that he should judge eighteen yards good—eighteen to twenty yards, eighteen yards any way—and he is asked what would be the average number of cubic yards a team in his gang with a scraper would do per day.

Which question was objected to by counsel for defendant; which objection was overruled by the court; to which ruling of the court counsel then and there duly excepted.

Witness answered that they put in fifty yards a day with the teams he had.

(Witness continues:) The teams owned by me and the laborers, as far as I know, were about the same as others. It was the same kind of material; did the grading on sections 1 and 2. Before I left them they were up to grade according to the original stake. I know that after I put up the track to grade on sections 1 and 2 they put in stakes to raise it. I suppose they raised it with a train. I saw the train at work there when I came down from sections 13 and 14. They were raising it then.

Cross-examination:

All the sections I worked on were one and two and 13 and 14. It depends entirely on the character of the earth which I am to handle as to how much a shoveller will do in a day and how much a team and scraper, and also the distance I have to carry it with the scraper. I expect the work on the various sections was not all of the same character; I expect it would not cost the same. I could not say as to whether I could get within any reasonable accuracy of the amount of grading that was done by knowing the
153 number of men and the number of teams employed on the whole work.

Redirect examination:

When stating the amount that a shoveler could shovel and that a team and scraper could scrape I meant that they could do that where I was at work. There was no particular difference in the character of the soil where I worked. There was a difference in the case with which the dirt could be got at from where I worked and where others worked. It was all close to where I was working, at the side of the embankment, close to the track.

GEORGE W. WILLIAMS, a witness for plaintiffs, testified, among other things, as follows:

Business, doing railroad work; principally construction of earth-work. Commenced work on the railroad in question on the 25th of September and quit on the 15th of November; was there as foreman of a grading gang; commenced work on section 3; worked down to Bull creek, on section 4, and moved east as I completed the work and crossed the river and went on sections 21 and 22; also worked on sections 5 and 6. In September, before any work was done on the road, I walked over that part of the old line west of the Kankakee river with James McGinnis for the purpose of taking a contract on the road; also walked over sections 21 and 22, probably two miles further east; examined the stakes carefully and the condition of the road. On sections 4, 5, and 6 and along there the old bank was in a very dilapidated condition—catacombed with musk-rats; great holes in it. Then it would be washed out, in some places to a sharp backbone, probably just a little path. Then you

would come to a hundred feet where the bank would be rea-
154 sonably good, lacking probably three or four-tenths of being up to grade. The bank was not full in any section; it was worn away; nowhere the proper width—not in a single section.

Q. You can state whether you are able to arrive within reasonable accuracy of the amount of earth-work in cubic yards your men you had under you and the teams with scrapers did per day—the average.

Which question was objected to by counsel for defendant, which objection was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

(Witness answers:) Yes, a man can form that opinion that understands the handling of earth-work. Earth-work is classified; what you call earth-work is the top surface; when you get below that you come into clay and hard pan, as you go down. In making a contract a man classifies the material in bidding on it. What is considered earth-work is nice shoveling—where a man can put his foot on the shovel, put it down to the depth of the shovel, and bring up a good shovelful of dirt; when you get below that your material changes and, of course, your work changes. A man can arrive at the amount of work his men are doing by his teams; even if he had no grade stakes to go by, he would have the dumping boards to haul the dirt in. Those are generally built of certain dimensions, and he would take his watch and time a wagon—how many loads it is making in an hour—and he would have so many men shoveling dirt in the wagon. When one wagon drives out another drives in. The men are kept constantly shoveling, and by his watch and by the size of the dumping boards and the material he is handling he can come within a very few yards of what forty or fifty men shovel in a day.

Q. State about where the men are shoveling from the side of bank where there is no dumping board.

155 A. A man is casting in a road-bed. Now, a good section man you pay a dollar and a half a day, or $1.75, and he will cast twenty yards of earth in the road-bed.

Counsel for defendant objected to the answer and moved that it be stricken out, which motion was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

(Witness continues:) Where you leave a berme three feet—that is the general average width through the prairie country—he will cast twenty yards of earth into the road-bed. As to how many cubic yards a day a team and scraper would haul it depends on the distance. Where I worked the runs were short. We got material at the most convenient point; never use a scraper where I have to go to exceed 150 or 200 feet; it pays better to haul it that distance. The material I worked was of a loamy, sandy nature, and you put on a scraper double what you could of dry earth where it was not damp enough to adhere together. The scrapers would fill up. The

teams I worked were fresh country teams, and strong. They were not broken down by road-work, and I made an average of the teams I was working, taking all in all, and they put on sixty yards a day. I didn't calculate anything less. I had some trouble in discharging a man because I did not think his team was putting in that amount of work, and I told him I did not think I could afford to keep him; have known railroad teams to put in as high as 75 yards of earth in a day. I know about shovelers by my experience. I have graded miles of road by shovelers of station work, where it had to be measured up by engineers, and I was allowed by the company's engineers at that rate, and, in fact, it has run over that.

156 Cross-examination:

Worked on section 3 about five or six days; had on section 3 three or four men; might have been five; a very small force on section 3 in starting in. From section 3 went down to Bull creek; worked there in the neighborhood of two weeks. Without referring to the time book cannot tell the number of men I had there; increased my force at Bull creek, and had probably eight or nine teams there doing scraping work; left Bull creek about the middle of October and went on east; remember grading east of Bull creek, but cannot give you the sections; went on section 22 the last days of October or the first of November. The work we did on sections 22 and 23 was done in November; it was scraper work and wagon work combined; remember of cutting a ditch on section 22; it cost, if I remember, between $250 and $300; believe when I was on the stand on the former trial I stated it cost $260. That is the ditch I said the engineer told me to cut and keep an account of the cost of it, and that the company would pay it; believe I remember testifying before that I commenced the ditch at sixteen feet wide at the mouth and tapered it down as I went down the slash where the water spread out and did not require a ditch of the same size I started with; cut the ditch probably between 1,500 and 2,000 feet; had not stakes to go by; guessed at it by stepping it off; was not staked off every hundred feet, and I could not tell; don't remember what I paid a day for the teams; am under the impression that it was $3.50 and from that to $4 a day. The ditch where I commenced was about five feet deep. I might be mistaken about the length of the ditch, and as to whether I testified before that the washout in the road was 1,500 feet long and the ditch 600 feet long I might be mistaken. I remember the length of the ditch on the road more accurately; that was staked off; I could tell every hundred feet.

157 If I stated it in that way on the former trial my memory then was fresh, and that is correct. The ditch was towards the east end of section 22; could not tell how long I was in filling the old ditch; had not completed it when I was ordered to stop work; don't think I testified on the former trial that I was using fourteen teams on the ditch; that I would go in with fourteen teams in the morning and come out with twelve or thirteen in the even-

ing; don't remember that I testified I was fourteen days in filling in the washout. I done a great deal of other work; believe I remember testifying something to this effect on the former trial. "I don't exactly remember how many days I was filling that ditch. In fact, I didn't get it quite completed when I got my orders to stop. I had sixteen teams, and I would put them in in the morning, and probably some of them would fall out during the day. My teams would probably average 12 or 13 daily;" don't remember whether I testified on the former trial that "I worked in that whole section in 22 the same on 21. I put in 14 days' work on 22." If my evidence on the former trial was that in section 22 I stated I put in 14 days' work with an average of twelve teams, that statement is correct. I was ordered to stop the work on the evening of the 15th; probably another day's work would have finished it; don't remember the length of the ditch along the road that was filled in; remembered about it when I was on the stand before, and would corroborate the evidence now that I gave then. I was watching the men to see how much they were doing a day. They were not all doing an average of sixty yards a day per scraper. We had some work there that you could not scrape sixty yards a day in. When I mentioned sixty yards a day I am speaking of good material to scrape with a scraper. I don't mean to make that where you can't fill up your scraper. The material on section 22 was good material, and that is the kind of material we could do about sixty yards a day of. We got it adjacent to the ditch and filled it in.

158 Redirect examination:

The ditch on section 22 came in at the east end of the section and run west for several hundred feet. Some places it had taken the road-bed entirely away and washed out holes probably six feet deep; in other places it probably would take just half of it. Then you would come upon another place where the centre stakes would all be in the ditch, and then it gradually went down. As it went west it took the line of the road and run along the margin of the slope stakes; took off probably a foot or a foot and a half. There was a stream of water running down there about two feet deep. It run like a mill-race; it took right down the old grade of the road. I could not fill in that ditch without drawing the water away. I called the attention of one of the assistant engineers, either Witsell or Gregg, to the fact, and he said he had set some stakes on the south side and wanted a ditch made over there to drain the water from the road and take the dirt from the new ditch and fill the old ditch with.

159 That was impracticable, and I could not do it. The water was running too fast. I told him I could cut the ditch straight across the railroad and run it through in the slow slush. He said that was the most practical way; to go ahead and do it. I asked him who was going to pay for it; that the *the* ditch was outside of the road-bed entirely. He said he supposed that the company would settle for it, but would let me know by the time I got

ready to go to work, and told me to keep an account of my expenses in digging the ditch. We found chunks of iron ore there, in the ditch, that would weigh half a ton. The men had to pry them out. The engineer passed after I had the water run down that way, filling the ditch, and congratulated me on getting it dry. He said he thought it was the proper thing to do.

Cross-examination:

I judge that one piece of iron ore would weigh half a ton by the amount of me- it took to get it upon the bank. There was only one that I thought would weigh half a ton. The other pieces
160 were all the way from the size of your head to half a bushel; could not tell how many there were. We were most of one day digging with a pick at the ledge of iron ore; could not use our scrapers; struck it immediately under the sod; had my entire force working on it—fifteen or sixteen men. This was off the right of way in the new ditch. I was digging several hundred feet.

JOHN RICHARDSON, a witness for plaintiffs, among other things, testified as follows:

Engaged in the business of railroading; most of it has been section work; have been doing it about 14 years; section work is repairing tracks. The only experience in doing earth-work was on the road in question; was engaged on that road from the 15th of September up to the 15th of November; was engaged in grading; worked on sections 2, 12, and 13; never made any estimate of how much the men would do per day; was foreman of the gang of laborers; never had any experience before with earth-work on rail-roads. I kept the time of the men in time books and sent it
161 to the headquarters of the plaintiffs; kept it correctly. I saw the old grade before any new work was done in sections 1, 2, 12, and 13. The condition of the old bank was in pretty bad order. The edges were all gone; it was up to a narrow point at the top. In some places it was gone altogether, washed away. In other places there was a strip along the centre. In some places I had to commence my grade in the water; could not tell how wide it was; what we could use of the old grade would average ten feet wide at the base, on a portion of it where it was still standing; no part of it was quite to the height of the new grade.

Cross-examination:

Some of the old road-bed was ten feet wide at the base. The sections I worked on we put the bank to the slope stakes; did not undertake to average the width of the old road-bed, either at the top or bottom. We simply took it as we found it and built on it to bring the road up to grade for the present track.

ALBERT MILLER, a witness for plaintiffs, testified, among
162 other things, as follows:

Business, that of carpenter and bridge-builder; have been engaged in that business for the last twenty years; have built county bridges and railroad bridges; built bridges on twenty-five miles of the Nickle Plate road; went on the line of this road somewhere from the 10th or 12th of October, as the bridge foreman, in charge of the bridge gang; built on this road or superinte-d the construction of, I think, seven bridges; ascertained the height of the bridges by the elevations given by the engineers, who drove pegs in the piling to saw it off by; built the bridges of the height as directed by the engineers; never raised any of the bridges. The bridges were built higher than the grade; the height of the bridges above the grade varied; in some places the bridges were ten or twelve inches above the grade at the bridge, and in one place the bridge was built, I think, something near two feet; that *that* was at Bull creek, above where the grade was. When I say above grade I mean above the top of the grade at that time. The bridge at
163 Bull creek, they gave me the elevation when I went there. I don't remember just what date it was; think it was somewhere about the first of November. I think Bull creek is in section 6. The bridge engineer for the company was Lewis Shaw. In building bridges it is usual to put the bridge higher than the grade, an average of about six inches, where the grade is complete. They do that for surfacing and ballasting—raising the track after it is laid. I did not put in any bridges but what was more than six inches above the grade; saw the track being raised in sections 1, 2, and 3; saw the surfacing gang at work there raising the track; they were lifting the track right up—raising it several inches in some places.

Cross-examination:

None of the seven bridges built by me were large. The one at Bull creek has 16 spans. On sections 1 and 2 they run about five to seven spans. They were not culverts. They were what we call pile bridges. They were not long bridges. All I know about the grade is that the engineer gave me the grade for the bridge.
164 At the time I was building the bridge the grade of the road was below the bridge grade, and at that time they were at work constructing the road or part of it. On section 5 and 6 they were still grading. At Bull creek they were still grading the roadbed, either on section 5 or 6. I don't think the grading was ever brought clear up to the proper grade while I was there.

JOHN MURPHY, a witness for plaintiffs, testified, among other things, as follows:

Live at North Judson. Section 46 of the road in question terminated at North Judson; am a farmer, and have been railroading some in the last twelve years, doing earth-work; made the earth-

work of a mile and a quarter on the east end of the road, on section 46. Section 46 is a full section and a fraction over; had a contract for doing the earth-work on that section; commenced work on that section on the 2nd of October; completed it on the 28th of October. My share—I had it all done before the first of November; remember about the engineers of the company measuring the sec-
165 tion for the October work; completed the section as far as they would allow me to at the Pan Handle railroad. I was stopped at the crossing, and after that was done and before the first of November the engineer made the measurement. There was about 300 feet of the section that I did not do. I know it was 300 feet by measuring it a few days ago. I did a mile and a quarter less 300 feet. The 300 feet undone was about the same average, as to the amount of work to be required, as the balance of the section. In the same year I did work on the Chicago and Atlantic where that road crosses the Indiana, Illinois, and Iowa road, at North Judson, from the crossing of the Kankakee.

Q. How long were you engaged in doing the work?

Objected to by defendant's counsel.

Plaintiffs' counsel states that he proposes to prove by the witness that he did work on the Chicago & Atlantic road, on the same soil, at the same place, and that he took his men off the work on the Chicago and Atlantic and put them on the road in question, and that on the Chicago and Atlantic they did an average of eighteen
166 cubic yards a day by measurement of the engineers of the Chicago & Atlantic.

The COURT: Go on.

The which ruling of the court counsel for defendant then and there duly excepted.

(Witness continues:) After I took this contract from Mr. Allison I had the men on the Chicago and Atlantic there doing work, and I took them right off and put them on this road. They were men that had been with me for many months, and they were good, steady men, and I put them on this road and timed them to see what they could do—the same men I had on the Chicago and Atlantic—and the average was eighteen yards a day casting done by the men on this road. I know it was an average of eighteen yards a day by the grade stakes by measuring the ditches as they throwed the dirt out of them. The engineers of the road in question allowed me for the grading done on section 46 1,872 cubic yards; used the same men on this road that I did on the Chicago and Atlantic. The men averaged on the Chicago and Atlantic from 16 to 18 yards per day to the man, and a good deal of it was wheeling. The soil on
167 the two roads was about the same, and it lay in the same country. There was a little wheeling to be done on this road just at the approaches. It was harder on the Chicago and Atlantic, because we had more wheeling. I think it would make about two yards difference on the least calculation between the work on the two roads.

Q. You may state with as much accuracy as you are able the number of cubic yards per day that your men did.

Which question was objected to by counsel for defendant; which objection was overruled by the court: to which ruling of the court counsel for defendant then and there duly excepted.

I have said it was eighteen yards on an average. The total number of days' work my men did in casting on section 46 was 94½. I also had teams with scrapers and did eighteen days' work with them. I had three teams. I estimated by timing and counting them.

Four scrapers per yard, they would take out sixty yards per day; take it out and dump it again. I haven't made a computa-
168 tion of the amount of work I did on section 46. I had a conversation with Robert Greeg, one of the engineers. I said to him, when he came along to estimate my *my* work, that I wished he would give me the figures or something near it when he came back to see how I came out with my men. I had been paying off a good many of them as they went along, and he said he would, and when he came back I asked him for the figures, and he said he could not give it to me, but that I could write to Mr. Shaw and he would send it to me in a few days.

Cross-examination:

Did not write to Shaw. I took the contract from Allison. He was to pay me. He paid me for the estimate I got on the estimate of the engineer's that I accepted; haven't brought any suit against Allison, nor has he paid me any more than the estimate.

The only way I had to get at the amount of work done was in the manner stated, by estimating the number of yards that the men and teams would do in a day. With the exception of one
169 piece of the road, about 300 feet long, which was rather low, the balance of the section was in a dry country—sand knobs and ridges.

The low part they raised about nine inches, as I — told the *the* water would overflow, and there was no outlet. I have been over the road in question. I don't know that there could be more work done on that section per man and team than on other sections. The ground was in little better condition, but one of the greatest troubles was there was so much light work skimming off the old grade.

The men could not handle more work a day there, except the work on that section was better than several sections in the matter of being able to do the work cheaper. I was not over the road beyond St. Pierre; could not say whether there was any other section that I could do the work as cheap on as I could on 46. It takes more to do the work in a low country.

In parts there are section after section of low country as you go west. I don't think it was low, wet, and marshy all the way to Momence, but was in parts. After you got about eight or nine
170 miles west of St. Pierre from that to Momence is very low country—about as low as any section of country.

Redirect examination:

They raised the grade on me about nine inches on the 300 feet. After I had brought it up to the original grade the engineer required it to be raised nine inches higher, and I did the work.

ANDREW G. LINZA, a witness for plaintiffs, testified, among other things, as follows:

Am engaged in farming now; have been engaged in doing earth-work for railroads; from my experience am able to form a judgement of what I think a fair average lot of men at work as laborers and a given distance to shovel the dirt and haul it in scrapers or wagons, with a certain kind of material to work in, *with* average per day; did the earth-work on sections 28 and 29. My knowledge of the locality and the men and what they were doing was sufficient for me to arrive at the approximate number of cubic yards they did per day; commenced on the nick*le* plate four years ago with
171 some men, and then I went to work on the Chicago & Atlantic and built three miles at the Kankakee river, and then went on the road in question and commenced at North Judson and laid about 12 miles. On the Chicago & Atlantic I had the quantities given to me as measured by the engineer. From my experience and what I know of the men I knew what they were averaging on this road. The material on this road, except about 500 feet, was about as good as any I worked on the other road. In the month of October on this road I did 202 days' work with shovelers, and in October I did 43 days and 4 hours with the teams on sections 28 and 29. In November I did 98 days' work with the men. The shovelers would average 18 yards per day in that ground. I figured those things very carefully when I was working my teams. I estimated it at about 45, but would say they did 40 yards a day. That is what I wagoned and scraped at the time. I had a talk with Mr. Shaw, the chief engineer, about the
172 work. I had a talk at North Judson with Mr. Shaw after they got into the fuss; was at the hotel where he was stopping, and I asked him if he would give me an estimate so I could get my pay of Allison & Co., and he said, "I won't give it;" and I said, "Why, Mr. Shaw?" and he said, "Because I won't; the way you acted; I won't give it to you;" and I said it was nothing more than I expected of such a man as you. In speaking about the amount of the estimate he said to me, "You won't get as much as you think you will." Did this work under Allison & Co. by contract. My claim for it is against Allison; have not settled for it, haven't got that estimate. We have partly figured it up and Allison has paid me some money; he has not paid me all; have got a claim against him yet. The understanding is that he is to pay me when he gets his pay from McGillis & Hogan. Neither Allison & Co. nor myself have any claim against the railroad company, but Allison against McGillis & Hogan, and mine against Allison. The average

done by my men and teams on these two sections, I think, is
173 about a fair average of the work that could be done on the other sections, or except about 400 feet on section 28, where there was a deep culvert.

Redirect examination:

Received a statement from Gregg, the assistant engineer, as to the five stations or 500 feet on section 28 after we quit work there; that was for five stations that was let out as station work, as we called it, and I wanted to get it to pay those men off for doing those five stations; that was about the 20tn to the last of November.

Witness is asked what he did with the statement obtained from the assistant engineer, and says: I went to Gardner, Illinois, to settle up and get some money, and while I was there Mr. Falsey took it and kept it; he said he wanted that, and he has got it yet, for all I know, for it has gone; I have never seen it since. Falsey is partner of Allison's.

Plaintiffs' counsel states that if he does not prove about the statements by Falsey when he comes he would withdraw the evidence.

PLAINTIFFS' COUNSEL: State, as near as you can recollect,
174 the number of cubic yards there were in those five stations as given you by the engineer.

Which question was objected to by counsel for defendant; which objection was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

A. I could not just tell the number of cubic yards there were.

Is asked about how many and says: I think it is something in the neighborhood of about 500 yards in the five stations on section 28. The work to be done on those five stations was about an average of the amount of work done on the other 48 stations in that section.

JACOB TROXELL, a witness for plaintiffs, testified, among other things, as follows:

Am a farmer and did the work on section 26 on the road in question, all except about 200 cubic yards on a cut that was taken out by the company after I quit; did the principal part of the work in October.

Is asked to state the total number of day's work done by the shovelers.

Which question was objected to by counsel for defendants; which objection was overruled by the court; to which ruling of the
175 court counsel for defendant then and there duly excepted.

A. I did 41 days in October with a team and I did about 44 with the shovelers in October. In November I did 20 days with a team and 3 days with a shoveler. The work was sandy and was done with scrapers, except where the haul was too long, when I did it with teams; don't know how many yards per day my men did with the

shovel. I only know from the preliminary survey and the estimate that was given me by the engineer, and I estimated it by stations. I gauged it by preliminary estimate.

Q. Do you know how many cubic yards you put in?

Which question was objected to by counsel for defendant; which objection was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

A. I think I put in, on an average, about 55 yards a day with the men and teams. I did the principal part of it with the scrapers. I hauled from the cut about four stations—four or five hundred feet.

I had a talk with Mr. Gregg, the assistant engineer, with ref-
176 erence to my work. I was asking him how I was coming along—to see if I was going to make any money. I asked him for my estimate.

Q. What did he tell you?

Which question was objected to by counsel for defendant; which objection was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

I asked him if he would give me an estimate, and he said he would give me an estimate when he came back—he was going to North Judson; when he came back I asked him for the estimate and he said, "I am forbidden by the company to give you any estimate," and at the same time he says, "You want to be careful not to hire too much of your job; you want to be careful."

Cross-examination:

Was hired by Allison & Co. or by Mr. Falsey. The convers-ion with Gregg was after the October estimate—some time in November; think it was not after the trouble on the line of the road; don't think the conversation was as late as the 14th of November; was not a witness on the former trial; was summoned, but did not
177 come; figured out the statement given in the examination two years ago, at the time I was summoned; have been paid for all the work I did for Allison & Co.; I gave my contract up.

L. R. TAYLOR, recalled for the plaintiffs, further cross-examined by defendant's counsel:

Went over the road to assist in paying the men, with McGillis; he was acting as paymaster, and I was assisting him; that was the paymen- on the September estimate. We started out to pay the October estimate on the 13th day of November. We went as far as about section 2, and then returned to the office. In November I did not go over the entire 26 section to pay.

Further examined by plaintiffs' counsel:

I received reports from the various bosses along the line as to the time of the men; the reports were furnished in the time books; I have looked the time books over, and have made a calculation from

them as to the number of teams and men; cannot give the result by sections, but I can by the foremen and by the months, by the
178 memorandum.

Defendant's counsel understands the witness to say that the statement which he has prepared was taken from the time books furnished by other men, and objected to his giving evidence of that formulation.

PLAINTIFFS' COUNSEL: Were those books the same that were furnished to you at the time you were doing duty on the road?

A. They are the same books.

Q. On which the men were paid?

A. They are the same books from which we made up our pay-rolls each month, on which we based the calculation for the amount of money due from us to the men for team work and labor work.

Which evidence was objected to by counsel for defendant; evidence admitted, subject to the objection; to which ruling of the court counsel for plaintiffs then and there duly excepted.

DEFENDANT'S COUNSEL: The books would be the best evidence.

PLAINTIFFS' COUNSEL: We will bring the books if they want them.

The COURT: This is simply in connection with the books.
179 I understand they are going to introduce the books. (To plaintiffs' counsel): You will put them in evidence.

PLAINTIFFS' COUNSEL: Certainly; we have got them here.

The WITNESS: This paper was made up December 1, 1883; I think by myself. The foreman first named is S. A. Austin. In the month of September he did 92 days and 3 hours' work by team; he did 50 days and two-tenths with shovelers. In October, by teams, 60 days and 3 hours; by shovelers, 11 days and 4 hours. About the middle of November Austin quit work and W. J. Hazlett took his place as foreman of the same gang, and Hazlett did, for October, 66 days and 1 hour's teaming work, 22 days and 8 hours' shovelers; for November, 85 days and 1 hour on team work, 70 days and 5 hours' shoveling. Thomas Allen, a foreman, did, in September, 22 days and 6 hours' teaming, 7 days and 7 hours' shoveling; in October, 96 days and 9 hours' teaming, 119 days and seven hours' shoveling; November, 10 days' teams and 20 days 6 hours' shovelers. John Richardson, foreman, in September, 16 days' teams, 126 days and 6 hours' shovelers; in October, 14 days 5 hours' teams, 188 days 1 hour's shovelers; November, 133 days 4 hours'
180 shovelers. Ten hours is what we calculate a day's work. David Anthony, foreman, for September, 79 days and 1 hour for teams; 155 days and 3 hours for shovelers; October, 101 days and 1 hour for teams. The rest of the paper continues with like statements under headings September, October, and November for teams and labor. It is correct and was made by me.

The COURT: You can consider it in as his statement.

Said statement was in the words and figures following:

Name of foreman.	Sept.		Oct.		Nov.	
	Teams.	Labor.	T.	L.	T.	L.
S. A. Austin	92^{3}	50^{2}	60^{2}	11^{4}		
O. J. Holset	-------	66^{1}	22^{8}	85^{1}	70^{5}	
Thos. Allen	22^{6}	7^{7}	96^{9}	119^{7}	10	20^{9}
John Richardson	16	126^{6}	14^{5}	188	------	132^{4}
D. Anthony	79^{1}	153^{3}	101^{1}	228^{8}	87^{1}	148^{8}
G. W. Williams	25^{8}	4^{3}	122^{8}	94^{1}	147^{7}	85
A. McGinnis	37^{3}	26^{3}	78^{8}	94^{4}	10^{5}	28
Jos. McGinnis	-------	36^{7}				
Jos. Dougherty	-------	-------	88^{3}	115^{3}	71	79^{5}
T. A. Calwell	33^{2}	21	45^{1}	28^{8}		
Jos. Ready	-------	-------	6	5	35^{3}	20
	309^{3}	427^{1}	679^{8}	904^{4}	446^{7}	585^{1}

181 This work was done, as I understand, at the time on sections one to fourteen, inclusive, and on sections 17 to 23, inclusive. In addition to that there was station work done by subcontractors. The station work was done between where Mr. Allen worked one of our foreman and also another foreman by the name of Alexander McGinnis; cannot locate it more definitely than that. We have two McGinnisses; one was the general foreman and the other was foreman of the day laborers. The one I refer to was the latter. The amount of the station work I cannot tell. We paid the men by the stations so much a cubic yard. I have got no memorandum of it at present. There was a memorandum of it made at the time; made by myself. It is somewhere in connection with the books belonging to the firm, which I turned over in 1884. I don't know where it is now. These men and teams have nothing to do with any other kind of work than the earth-work proper. They were not connected with the building of the bridges or culverts or cattle guards, nor with the piles nor the track-laying nor
182 the surfacing; nothing except the earth-work alone, such as putting up the grade of the road-bed.

Cross-examination:

I know that these men had nothing to do except with the earth-work, because it was not their business or their place to do it. We had other men employed to do that; have no personal knowledge except what my duty required me to know; have no knowledge about the matter except these books as returned to me; I have the books.

These books were prepared by the foremen daily at the end of each day's work; prepared the statement to show to W. A. McGillis what the men had done and the wages they had earned, and to see whether my books corresponded with the time. The paper does not show the amount of wages—only the time; did not use the statement for the purpose of making out the pay-rolls. I made up the pay-rolls directly from the time books; made up the statement to verify my book. I turned over our book to W. A. McGillis. I don't know where the pay-rolls are; they are in the same possession as the books. I don't know whether they are in the possession of
183 counsel; haven't seen them since two years ago last March. The paper presented here does not show whether the teams were working upon wagons or scrapers. A team, whether with a scraper or a wagon, is supposed to have a driver, and that driver's time is the time that is counted and allowed for. We don't pay the team; we pay the driver or the owner of the team. There was one driver to each team. They only got credit, at any rate, for each team, and the pay for the team included the driver. The paper presented does not show how much money we actually paid to either the men or the teams. I don't recollect how much we paid to the men or the teams in the month of November, but my recollection is that we paid $3.75 and part of the time $4.00 and part of the time 4.25 per day for teams; for the shovelers, my recollection is, we paid at first $1.50, afterwards 1.75, and, I think, in a few instances $2 per day, averaging a little over $1.75, and between $3.50 and $4.00 for teams. It was not the same in October as in September; the rise in the price of teams was about the middle of October; think the average would be something over
184 $4.00 for the teams per day. September was a very light month, for the work was just beginning, and consequently the lowest wages were paid, and the fewest teams and laborers were employed then as compared with the other months. I have stated that the paper presented contains the amount of labor employed in the prosecution of the earth-work in September, October, and November and nothing else. There is on a different page of the paper a statement of the iron gang.

(The other part of the paper containing statement of the work done by the men in the iron gang torn off, leaving the statement as to the labor and earth-work alone.)

Four years ago I made a separate statement of the number of men that were engaged in grubbing and clearing in September. They are not included in the statement presented, according to the best of my recollection; think I am certain of that, but still not positive; would not swear that they are not, but my best recollection is that they are not connected in that paper at all—that it is simply the construction of the earth-work; turned the books from which I made the statement over to McGillis; could not positively swear that the statement presented does not include the men who were working under the foremen in grubbing and clearing up the old road-bed,

but my recollection is that it does not; that statement was made four years ago, I think.

In scraping it takes one man for about five or six scrapers in a gang. We did very little plowing. The men were engaged, to a certain extent, in plowing in all the various work that had to be done in preparing the road-bed.

185 E. S. BLANCHARD, a witness for the plaintiffs, testified, among other things, as follows:

Was one of the firm of Allison & Co., sub-contractors under plaintiffs; traveled over the work and advised the men in doing the work on sections 26 to 46; helped the men along in the work as well as I could, directing in a general way. When I first went on the work there was grade stakes set, but no slope stakes. At the time McGillis & Hogan left the work Gregg, the engineer in charge, told me 35 miles of it was completed. The engineer said that sections 28, 29, and 30 and 39 and 40 were finished. My own observation was that the work was done on those sections first rate; was finished, leveled up, and the grade stakes set on it. The centre stakes that were saved were drove down to make the grade stakes. I have never had the question come under my observation so I could tell certainly what a man would shovel in a day; I have the teams. The soil of the five sections completed was sandy and marsh. The engineer told me in October that two miles were finished and in November that the other three were finished; traveled over a good deal of the road before we went to work on it—that is, the east end of it—east of the Kankakee river. The old road-bed was in all sorts of condition; it was washed, a good deal of it; some of it had been put up in a full road, and some of it had been put up just a point; some of it had not been disturbed; a little of it—but most of it—had been disturbed. The deepest was about 12 or 14 feet in the cut. We wanted to know something about the work before we went on it, and Falsey and I went to see Mr. Shaw, the chief engineer, and handed him a profile, which had marked on it the number of yards in the excavation and embankment and the amount of piling and bridging that would be required on the road. That profile is not one of those introduced in evidence. That estimate, when we came to
186 build the road, we found did not correspond with the fact as to the amount of work to be done. The estimate was smaller in every case. Shaw said that it had all been cross-sectioned there and the number of cubic yards marked. I supposed there would be stakes, and I went out from Momence to see the center stake and there were only a few of them. I came back to Kankakee, and I said to Mr. Shaw, "I suppose this is just a rough estimate." I knew what he had told me a day or two before. I thought he had made a mistake, and I said, "That, I suppose, is a rough estimate. There is no side stakes there;" and he said, "No; this is final; this is a final thing, and there never will be any change." I said, "There are no side stakes; it has not been cross-sectioned." He said, "Couldn't it be cross-sectioned without side stakes?" I said, "I didn't know that, but I sup-

posed it could." "Well," he said, "it has been cross-sectioned." Sections 39 and 40 were finished in October. Gregg, the engineer, said they were done and the amount that was done was over 2,000 yards less than Shaw's figures on the profile. When Mr. Shaw showed Falsey and me those figures on this profile he took it mile by mile and took the number of yards of excavation and embankment in each mile and put it down in a book. The book is here. (Book identified.) Mr. Falsey put down the figures in the book and I called off a good many of them. They were put down as correctly as figures could be put down. After they were put down don't think we checked them back. We were very careful to get the timber and everything in it.

The book containing the figures copied from the profile offered in evidence by plaintiffs' counsel.

187 The figures for sections 39 and 40 on the profile showed 5,744 yards of earth-work to be done. Shaw said there never would be any change, and when it was finished, in October, there was only 3,103 yards allowed as done or 2,641 yards short in those two sections; don't actually know how many cubic yards went into the work.

Cross-examination:

Went over the east part of the old road-bed from North Judson to the river for the purpose of seeing what kind of work there would be to do there; had a notion to bid on it, and was making an estimate of what it would cost a yard to remove the dirt and do the work so as to know what amount we could pay the men to do it for; had an idea that I could do it for about 12½ cents a yard on the east end; figured that on about 10 miles of the east end. The other 10 miles was pretty badly mixed; some of it was very bad and some of it very good; some of it was nice and some wet work—very bad work; had an idea that it would cost, a good deal of it, 20 or 25 cents a yard. We took a sub-contract for the whole of it, for the entire work, clear through, from McGillis & Co. for 15 cents. It was the last days of October or the first days of November that I had the talk with Gregg, the engineer; had not seen him run his levels over the bank before the conversation, but I saw the stakes there after the men went over the road the first time. He went over the road the first time and leveled it up pretty fair, but did not get it just right, and then went on and set some grade stakes to work to; then he finished where he was not right before. Then I asked the engineer if he had got it so the men would not have to go over it again,

188 and he said he had it so he would not have to go over it again; that it was done. That is what he said to me when he told me that the work was done. Shaw's profile showed 5,744 yards to be done on sections 39 and 40 for those two miles, and what they gave us for the work was 3,103 yards after Mr. Gregg told me it was finished.

Counsel for plaintiffs offered the Falsey book containing the figures copied from the profile in evidence; which evidence was objected to by counsel for defendant on the ground that it had not been properly identified; which objection was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

The figures copied in said book from the profile were as follows:

189 Section.	Excavation.	Embankment.
	Cubic Y'ds.	*Cubic Y'ds.*
1	14.8	3,356.4
2	2.3	5,717.7
3	300.6	3,841.7
4	838	927.8
5	174.5	2,846.3
6	61.7	4,675.4
7	30	3,604
8	466	1,032
9	180	2,235
10	35	1,153
11	83	1,923
12	----------	3,523
13	245	3,250
14	937	3,693
15	----------	7,982
16	----------	10,508
17	20	2,268
18	6	4,553
19	----------	12,500
20	36	3,234
21	2,577	792
22	1,057	2,104
23	2,742	2,794
24	2,671	5,677
25	2,747	1,264
26	2,640	1,031
27	781	2,186
28	368	1,371
29	3,472	1,441
30	1,247	1,882
31	----------	7,069
32	1,166	2,192
190 33	106	834
34	3,177	1,767
35	1,011	2,305
36	116	291

Section.	Excavation.	Embankment.
	Cubic Y'ds.	*Cubic Y'ds.*
37		3,568
38		2,838
39		2,091
40	1,327	2,326
41	681	2,310
42	624	1,950
43	625	1,564
44	1,464	1,068
45	1,220	1,400
46	520	4,600

191 JOSEPH E. YOUNG, a witness for plaintiffs, testified, among other things, as follows:

Am a contractor. (Defendant's counsel admits that the witness had a good deal of experience and had been engaged in railroad work for 20 years at least.) Have had to do with the case of dressing up an old railroad bank or earth-work that had stood for ten or eleven years; have never been over the line of the road in question, but I know something of the country generally; have crossed the line at different points.

Q. Now, in a case where a new road was built over that old work standing, say, for eleven years, and the work is done and the cross-section notes and level books and everything are all destroyed—now, how would you ascertain the amount of new work there was in that bank?

Objected to on the ground that the question does not describe the case at issue; which objection was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

— To make an estimate of a new road upon an old road it ought to be done either of two ways, to cross-section the bed for the earth-work to be done or carefully resurvey the ground and note the changes in the surface and where it was washed out. In case this was done after the road was built and after the old work was covered up and you want to ascertain as near as you can how much new work was done on the old bank I don't know of any method that could be taken to do it. There would be only one way to measure it accurately. That would be to go over the work before anything had been done and take a careful elevation of all the points where there were any changes in the surface, where there was any wash-
192 out, and take a careful measurement of the washouts, and after it was done to go over it carefully, and the difference would be the quantity. In case the cross-section or field notes were incorrect there would be no way of measuring it after the work was com-

pleted without you had taken measurements before you commenced to work.

On a level country you would lay down your centre line and take levels of the ground generally every hundred feet. If there were changes to be made between you would note those changes and take the numbers of the elevations between and set out your slope stakes and then you would have the width of the natural surface. If the slope stakes for the new work remained that would not make any difference. You would not make a calculation of the quantity from that unless you knew what there was between the stakes. In a case where it was a question whether there were 50,000 cubic yards or 200,000 cubic yards after the work was done—and I knew nothing about the measurement beforehand, except that I had the slope stakes which were set there by the engineer of the new work—the approximate difference could not be ascertained for the reason that a man would not know what had been previously between those slope stakes. Suppose, for instance, the new stakes showed a fill of 10 feet, there might have been a fill of 5 feet left of the old road, and the difference between the two a man could not tell unless he had known the state of the old road-bed there. In a case of that kind I would say it would be impossible to ascertain.

Q. You would just simply give it up?

A. Yes; I might guess, but I could not tell exactly.

Q. I am asking you approximately an approximate estimate or ascertainment approximately of the number of cubic yards in a section of one mile.

A. Of course, you could estimate between stakes the number of cubic yards there were in a section if there had been nothing
193 done; but, suppose it was new work, you could take the quantity and estimate between the stakes; but if part of it had been done before and you wanted to know what the difference was I don't see how it could be done unless you had your survey made carefully.

Q. You are now talking about engineering work?

A. Yes, sir. With an old bank of that kind, in order to ascertain accurately how much work would be required to make out your original quantity or air quantity, you would, in the first place, put in center stakes and take the level of the center line and the level at the slope and then note all the intermediate changes and take levels at all intermediate points where there were changes in the surface. I guess I have seen an old bank that has stood the length of time that this one did. I have been in the business of dressing up old road-beds a number of times. In case the bank was not firm, but had been honeycombed, it would be difficult to make a cross-section of it in the beginning; it would be impossible without an unusual amount of care. I think probably the way to estimate it would be to estimate it in the pit from where it was moved, and not the embankment—that is, to cross-section the borrowing pit; but it would be very difficult to do it in the other way. Usually the estimates in doing earth-work as shown by the original quantities are not sufficient; they are not equal to what is finally found to be nec-

essary to build the road. It is determined by estimate that the original estimates are sufficient. The original quantity or air quantity is the amount required to fill in an imaginary line—the slopes, the bottom, and the top—and the engineer, in determining what the amount of the original quantity will be, does it by multiplying the length, breadth, and height together. In a given prismoid of certain dimensions which, when multiplied together, show that it will contain 5,000 cubic yards it is ordinarily found that there is
194 more than 5,000 cubic yards within that line.

It is a sort of general understanding or plan of all engineers to allow so much for settling. You start out to make a solid road-bed, but in process of time the work settles and you make an allowance for that; that is the most difference there is between the original quantities and the amount of work put in on the line of road, and most generally there is something for cattle guards and ditches to drain the water off, and so on; have in my experience, where earth was taken from a borrow pit, measured the borrow pits and compared the amount taken out with the original quantity required, and we generally allow 10 per cent. for the shrinkage. The actual amount of cubic yards put in are generally about 10 per cent. more than the original quantities called for.

Cross-examination:

In the case of this road, where the old Plymouth and Kankakee road was partially graded in 1872 and the work left and in 1882 the company commenced the reconstruction of the road, as an engineer to prepare the road for laying I would run the center lines of the road and my grades; then I would put in my slope stakes and from those grades take a measure of the present surface, and the difference between the two plus, say, 10 per cent. for shrinkage I should call an estimate of the work to be done. Assuming that the contract was let and the work commenced on the 14th of September and it became necessary about the middle of November to make a measurement of the work that had been done upon the line, if it were my own case I would have aimed to measure all the work in that pit—that is, from where the work was done and not in the bank, but in the pit, where the work was taken from; that would be the better way. The next best way to make a substan-
195 tially accurate measurement of the work would be, before commencing the work, to carefully take levels of the surface of the old — on the section I was going to make an estimate on, and after the work had been done, if it was built on the old stakes, I would take levels of it and see what had been done and I should take the difference and then add, perhaps, 10 per cent. for shrinkage. With the original notes I could make substantially an accurate estimate of the amount of work done in that time, and with those notes when the work was completed I could make a correct measurement of the work done upon the road if I had done my work properly in the first place. It must be done in that way from the excavation or in the way I speak of in taking the exact surface of the old road and then calculating the difference between the old one and the finished one and then add something to that. I would not think it

would make very much difference about the old road having been honeycombed by animals. If I was doing the work I should measure it, and I would look over it when I made the original survey and make the estimate in my own mind. I think it would be difficult to do it from an actual measurement.

Redirect examination:

If the old track was such that when I drove a team on it the horses would go through to their bellies I would have to make an approximation of the amount required for shrinkage. I would either have to do it in that way or measure it in the pit. I think the rule would be to measure it in the pit where the earth was taken from.

196 JOHN ALLISON, a witness for plaintiffs, testified, among other things, as follows:

Have helped to build two or three railroads—the earth-work on them principally; was in connection with Mr. Falsey principally. I took the contracts and he and Mr. Blanchard did some of the work. I was out with them occasionally and on pay day I would always be around to see about the men getting their pay. I went over the road in September from Momence on section one, then came back onto the road where it crossed the river again, going further east about to section 25 or 26, and from there we followed the line to North Judson; walked over a good portion of it where I could. Part of the time I would drive and they would walk, and part of the time they would drive and I would walk, and so we came back over the same route to Momence. The east twenty sections the old bank in the low part through the marshes showed only signs of an old road-bed, but it was washed out in some places; other places it seems to be in reasonable shape, but narrow, flattened-out like; other places it seemed to be narrow and little cones in it. In this case my recollection is there were some of them that had never been touched; if so, very little. The most part of one or two, in particular, nothing had been done on. When I came back Mr. Falsey, Mr. Blanchard, and I had the profiles and the figures that were taken from Mr. Shaw's cross-section. I saw Mr. Shaw and said Mr. Blanchard had told me that those were the actual quantities that had got to be put in. He said, Yes. I replied it seemed it would be more than that. Shaw said, "It will never be no less nor no more; them will be the final quantities." After that I took a contract with Mr. Gillis from the west end of 26 to the east end of 46, except 4,000 feet in Wolf marsh, in section 31. I objected to that, as I came pretty near
197 getting drowned there.

A few days before McGillis & Co. had quit on the eastern end of the work I asked Shaw what time I should go over to get my pay. He said that I need not come until after the 15th of November; any time after the 15th of November. I went up on the 15th of November and saw Mr. Shaw at his office, at Kankakee. He told me that they had paid McGillis and McGillis had gone upon the line to settle with the men. I went to Momence and found that McGillis was about to quit work. I then went back to Shaw

and told him the situation on the line and he told me to go on with our work and finish it up.

After we had got through as far as we did any work and quit I went to Shaw and he said he could not give me an estimate; that the men that I had sublet sections to along the line were pressing for pay and they would sue me. I finally prevailed on him so that he went and saw General Drake; at any rate, word came back that he would give me the figures of their estimate to set them down. General Drake would not let him give me the estimates. I did set the figures down showing the amount allowed after the first of November until McGillis quit and the work done after McGillis quit and until we quit.

(Witness identifies the paper containing figures that Shaw gave him.)

Counsel for plaintiffs offered the paper in evidence, which is in words and figures following, to wit:

198	November, 1882.				November, after 15.		
Sect.	Clearing.	Grub-ing.	Earth-work.	After McGillis quit clearing.	Grub-ing.	Earth-work.	Shaw agreed to pay.
26			1,194			866	2,060
27			926	1.8		189	1,115
28				0.9			
29			553	0.9			553
30	$1\frac{6}{10}$		1,969				1,969
31			207			1	208
32			360	1.5	2	261	621
33							
34			2,490			215	2,705
35			948			242	1,190
36	$1\frac{3}{10}$					294	
37			511			169	680
38				0.7	20	450	
39						13	
40						364	
41	$2\frac{3}{10}$		1,309				
42	$0\frac{4}{10}$		620				
43	1.6		351			109	
44			660			264	
45			860				
46							
	72	00	12,958	5.8	40	3,427	

That and the October estimates were all that we ever had to show for the work he had done. It was pretty well towards the last of November when I had this talk with Shaw and the figures on the paper were made; went over the road recently with plaintiffs' counsel; part of the time on a hand car and part of the time on a regular train, and compared the work as now done with profiles; think I could tell the difference between the rise of a bank of six inches or a foot or three feet, as we were standing on the rear part of a car, going over at the rate we did.

199

Q. How did you find the road as now constructed with reference to cuts and fills compared with those two profiles?

Defendants' counsel objects upon the ground that there has been a great deal of work done upon the road since 1883, and that the track was being raised all the time in parts, and that the grade had been changed; which objection was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

200

A. It seemed to be much higher. Only saw the road as we passed over it on the train. It was a mixed train. I didn't say I could tell positively, but my impression was that the profile was wrong; that there was more work there than the profile ever represented. I noticed special cases where the train stopped.

Counsel for defendant moved that all testimony with reference to discrepancies between the profile and the work as he found it when he went over on the train be taken from the jury as incompetent.

Cross-examination:

Went over the railroad about a week ago with plaintiffs' counsel; went from Kankakee to North Judson, and he met me at North Judson; then we came back to Kankakee; we met the witness Murphy and others, who have been called here—farmers. I don't say that I condemned the profile before I started out on the rear platform of the car. I did think before I started on my return to Kankakee that the profile was not correct. I had some knowledge of the work before I went up there. I held in my hand the profile and sat on the rear platform. I was taking the best observation I could at the speed we were going; could have done a little better if I had walked over the road. I haven't got my pay as sub-contractor of McGillis & Co. for the work done. I have sued McGillis in another court. I have been told by plaintiffs' counsel that I would get my *pro rata* of this recovery if there is anything got. I never was paid a cent for my work by McGillis & Co., either for September or October. After plaintiffs had drawn their last estimate I followed McGillis from Kankakee to Momence. Shaw told me that he had gone up the road, and I went up right after, but didn't find McGillis. I think I found his book-keeper; don't think I found Hogan there. They told me McGillis had gone to Chicago, and I think Hogan had also. I don't remember what

201

Taylor said. There was a barrier there. I couldn't get any
202 money and could get no satisfaction. Shaw said that he had paid McGillis & Hogan, and directed me to them for my money.

At the time Shaw showed me the profile at Kankakee with the figures on the margin estimating the amount of work I was surprised when he told me that the final estimate would not vary from those figures at all. Mr. Blanchard had told me what Shaw had said and I thought he was mistaken. I expected, as an old railroad builder and contractor, that those figures were as near the approximate amount of work as could be made, and I let the work according to that statement. I can't say that I was mislead by that statement, and I can't say that I was injured by it. I let the work. The statement contained in the paper introduced in the evidence of the witness was only for November work. I haven't got the October estimate. I think McGillis & Co. gave it to me. I don't know what has become of it. I gave it to Mr. Falsey, or rather Mr. McGillis gave it to him; Falsey was my partner.

203 Redirect examination:

I think I saw the statement said to be given by the engineer to Lindsey of five stations on section 28. I don't know where that statement is, if Falsey turned it over to me. I tried to keep the papers altogether. If he did I don't know what is become of it. I have made search for it and didn't find it. As a member of the firm I have kept most all of these papers. My recollection is that the statement showed over 620 some yards; that is my recollection of it.

PATRICK FALSEY, a witness for plaintiffs, testified, among other things, as follows:

I am railroading most of the time; farming occasionally; went over the line of the railroad some time in September before any work was done on it for the purpose of looking at it to see the country, and to see about what there was to do with reference to making a bed upon it. We went over the eastern 20 miles of it. I don't re-
member but what there was more or less work done on all the
204 road. There was a lot of the road where cuts had not been cut through. After I had been over the road I came back to Kankakee and saw Mr. Shaw; Mr. Blanchard went with me. We went up to look at the profile. I asked Shaw some questions relative to the work. The main point I wanted to know was whether the profile would be altered or not; it sometimes is; they make changes sometimes. I wanted to know in this case. He said there would be no changes made in the work or the profile; it was just as it was and just as it would be. I put the figures that were on the profile that we saw in a book that I had in my pocket.

(Witness identifies the book, and says that this is the book, and that where it was open to witness by plaintiffs' counsel the figures were put down for the different sections from the profile.)

Was not on the road while it was being built; helped to make the different contracts and let them to sub-contractors, farmers, and people along the road. I didn't mean to say that there was no work done by the old company on the cut and in the
205 sand ridge. I say there was a part of it undone and was not completed. With the exception of the very few spots, there had been more or less work done on the 20 miles by the old company; a number of places where there hadn't been any work done. There was not a cut where a portion of it had not been touched; the old surface had not been changed.

JOHN C. LANE, a witness on behalf of the plaintiffs, testified, among other things, as follows:

Occupation, a carpenter; prior to 1882 did some grading on the Pan Handle road to the extent of about a mile. I had a contract on this railroad for grading on sections 39, 40, and 41; commenced work there on the 2nd day of October, 1882; had completed sections 39 and 40 by the first of November; know they were completed because Mr. Gregg, the engineer, said that they were completed; he told me so; completed section 41 about the 15th of November. All I know about the completion is that they never came around
206 and said anything to me about it. I worked to the grade stakes that they left me and left it; I don't know whether they ever estimated it or not. I live at San Pierre. Sections 40 and 41 are right at San Pierre. After I left sections 39, 40, and 41 none of these sections were afterwards raised or any work done on them before the track was laid by the construction company. That was all the grading that was ever done on these sections.

Q. Will you please state the number of days work you did, first in October and then in November?

Which question was objected to by counsel for defendant; which objection was overruled by the court; to which ruling of the court counsel for defendant then and there duly excepted.

Witness says that he kept all his time together; didn't keep the time separate on each section; that he worked 304 days altogether with shovelers and 53 days with teams and scrapers on the three sections in October and November. It was pretty good earth to move; it was sand, all of it. There was a cut at section 39; there was
207 a little fill there, about two feet and a half, and then a cut, about five stations. The biggest fill I had, I believe, was 2 feet on east end of section 40. The cut was at the east end of 40, just after the road crossed the Louisville, New Albany & Chicago, going westward. The cut was deeper than the fill, and the fill was west of the cut, about ten stations. The fill was about 4 or 5 stations in length. The highest point of the cut was 6 feet and $\frac{5}{10}$, I think, and then it tapered down to 4 feet and $\frac{2}{10}$ at the next station, and the next about the same.

Cross-examination:

Some of the old bank, we had to dig a little off the top of it, and then there were other places where you had to put on a little; took my contract of Allison & Co.

LEVI HAZLETT, a witness for plaintiffs, testified, among other things, as follows:

I reside at Momence and am a farmer; live about half a
208 mile from the railroad in question; lived there and saw the building of the old Plymouth & Kankakee Pacific railroad. Prior to September, 1882, had been over the road as far as San Pierre; was never over the road east of the river, but three or four times up to the river. I had been over it every summer for eight or nine years hunting and rafting; went up by way of the road and came back by the river. The condition of the old bank from Momence to the river in some places was good; in others it was all gone so you couldn't see it. Around Bull creek the bank was all good except the creek. Above Bull creek there was some of the grade gone. Then you go above the bend of the creek and there was four miles that was all gone. I have run right over the old road with a boat for three miles from Sugar creek, east. Sugar creek is seven miles east of Momence; have not been over the whole country; down there at certain seasons of the year in a boat. There are some
209 sandy ridges. Down near the swamp in certain seasons of the year, when the water is high, we can go anywhere in a boat. It is a very low country. When I went over three miles of the old road in a boat was in July. It was all under water for three miles.

Redirect examination:

When the water was low the grade itself was gone in places; not for three straight miles, but part of it—half of it or such a matter, where there was no trace of the old grade.

(To defendant's counsel:) The cut about four miles east of Momence is not a deep cut, but it is a long cut. The excavation by the old company remained. There was a slight cut on that right at the east end; there was a cut of four inches.

E. S. BLANCHARD, recalled for the plaintiffs, testifies, among other things, as follows:

When Gregg told witness that sections 28, 29, 30, 39, and 40 were done he said that the others were nearly done, and 44 and 45 were all of them nearly done—not finished exactly, but nearly
210 done. Section 37 required the most work to finish; on the balance there was but very little to finish them. There were no bridges put in. They raised some at the end where there are bridges, but very little; the grade was raised.

Cross-examination:

Went over the entire twenty sections; the last time about the 13th or 14th of November. Allison's forces were on the land then.

It was admitted by defendant's counsel that the statement of the five sections, if prepared by any of defendant's engineers, might go in evidence.

The plaintiffs here rested their case.

211 Be it further remembered that on the trial of said cause, after the defendant had introduced the foregoing testimony and rested, the plaintiffs, to further maintain the issues on their part, called in rebuttal the following witnesses, who testified respectively:

WILLIAM MCGILLIS, who testified, among other things, as follows:

I am able to state exactly on what day I got the estimate for the October work; it was the 9th day of November. I know because I came the next day and got my check; I got the estimate on one day and the check on the other. James Hogan handed me the estimate on the line. I got it on the 9th, some time in the afternoon, I think, and got the check the next morning. I didn't say I found Mr. Drake there. Mr. Shaw and young Drake told me that he left for New York that morning. I got a certificate of deposit of the check from the bank; a deposit ticket when I deposited the check; got it at the bank on the 10th. I got it from him yesterday.

212 Defendant's counsel states that there is no dispute about his getting this draft on the 10th.

Recollect distinctly when I had the talk with Shaw; went from there into young Mr. Drake's room, and from there I went to the bank with the draft and deposited it.

Cross-examination:

Don't recollect any talk with Drake prior to the 9th of November in their office at Kankakee; had a talk with Shaw on the 10th; don't recollect that I testified having a talk with Shaw and Drake relative to the amount of the measurements and the amount of the certificate that we received. The draft was given to me on the 10th by young Mr. Drake, at Kankakee. I do say that I had no conversation with Drake prior to the time when that draft was given relative to the estimate. I do say that I had no conversation with Shaw prior to that time, because I didn't know what the estimate was until the 9th, and never saw it until then.

JAMES MCGILLIS, who testified, among other things, as follows:

213 After McGillis & Co. quit work in November I took a contract for section 19 in connection with Mr. Troxell; don't just remember the number of cubic yards, but it was about

4,500. There were two contracts that I had with the company; one with Fairchilds for sections 23, 24, and 25. On these three sections it was estimated about twenty-seven, twenty-eight, or twenty-nine thousand yards; remember how the estimate compared with the original quantities put down. The estimate that I got overrun the original quantities some five or six thousand yards on these sections. I think from four to six thousand yards on these three sections at least.

Cross-examination:

The excess of the estimates reported over the original quantities was on four sections, 22, 23, 24, and 25; have not seen the estimates since; don't think my attention was called to the fact before to-day since I left the work, and I make the statement upon my recollection. I know that they overrun about that much. If I could see the profile I could prove it. There had been about a day and a half's work with a gang of men done on these sections. We commenced
214 on them some time in January or December and completed them about the middle of April; don't know how many estimates I received; received monthly estimates; commenced work in the latter part of December and finished the early part of April.

THOMAS HOGAN, recalled on behalf of plaintiffs, testified, among other things, as follows:

Remember about receiving estimate for the October work; was at Momence station, on the platform, when I received it. I think it was Mr. Whitsell or Louis Shaw were there, one or the other, and gave it to me; kept it awhile in my pocket until some time during the same day, after the arrival of the noon train, when I gave it to McGillis, somewhere about Gold creek, on section five. It was several days before we quit work. I should think it was as much as a week or ten days before; somewhere about the 8th or 9th of the month that I got it. I am sure I didn't keep it in my pocket two or three days.

215 And the defendants, to maintain the issues on its part, introduced the following testimony:

Foster Huddleston testified that he was a civil engineer in 1881 and in 1882 engaged on railroad construction. I cross-sectioned 7 miles of the Indiana, Illinois & Iowa railroad east of Momence in 1881. I measured the center of the grade, and, at the proper distances for slope stakes and where there were irregularities in the surface, took immediate measurements in order to get the correct contour of the surface. This work was done in the usual manner, according to the science of engineering. Cross-section stakes were set at the time. I made all the necessary notes for calculating
216 the amount of earth-work that would be required to bring the embankment up to the required grade. After I had made these notes I took them to Kankakee and turned them over to Henry Shaw, chief engineer.

Robert Duncan testified that in 1882 he was engaged in the construction of railroads. In the month of October, 1882, he was employed by the plaintiffs as track superintendent and had general supervision of surfacing the track for the plaintiffs on the Indiana, Illinois & Iowa railroad from Momence east. By surfacing the track I mean that when the track is laid upon the grade we surface it by throwing in dirt between the ties, raising the track, and tacking the dirt under the tile to bring the track to the proper level. I commenced work for McGillis & Co. October 1st, 1882, and worked until the 1st of November, 1882. I commenced laying track 200 yards east of Momence and laid about four and a half miles of track. The surface of the grade was very uneven. In a good many places
217 the plaintiffs had done no work towards grading the old roadbed, any more than leveling it a little, just enough to lay the track, so that the track could be laid on the old grade in order to reach the sand pit, three miles east of Momence, where we expected to get material and haul it upon the line with the construction train. Nearly all the track was laid on the banks below grade, and through two cuts the track was laid on the grade. After we got to the sand pit we hauled the sand west from the cut on the road and threw it off along the track to widen the banks and to raise the grade. We were about ten days laying the track to the sand pits; saw Hogan, McGillis' partner, at Momence the 13 or 14 of November. He told Shaw that if he was not given an estimate for track-laying he would put his men off the work; made no complaint about the earth-work.

F. M. DRAKE, a witness on behalf of the defendant, testified as follows:

218 In 1882 I was president of the Western Air Line Construction Company. I have been engaged in the construction of railroads since 1886. The defendant had a contract for the construction of the Indiana, Illinois & Iowa railroad and built about 60 miles prior to the contract with McGillis & Co. It was from Momence west to Streeter. I executed the contract for the construction company. The work was advertised and the bid of McGillis & Co. was the lowest.

Before the contract was let I had a conversation with McGillis about the work. I told him it was important that the work should be completed by the 1st of January. I told him I thought his bid along a part of the work was low, and asked him if he thought he would be able to complete it within the time according to the specifications. He bid for the work separately, and Mr. Hogan, his partner, also put in a separate bid. Hogan's bid was the higher.
219 McGillis said that he and Hogan together had about $10,000. He took Hogan in as a partner and they signed the contract together. In October I spoke to McGillis quite a number of times and told him that I didn't think he had force enough on the work to complete it by the 1st of January, and urged him to crowd the work on those sections which were marshy and hard to do, and

urged him very strongly to put on a larger force of men on the low sections, particularly sections 19, 31, 32, 15, and 16. I told him it would be impossible to do the work in those marshy places after the rains had begun to fall. After the October estimate was made Mr. Shaw and Mr. McGillis together spoke to me relative to a certificate and said that McGillis wanted the timber and lumber that he had purchased for bridges which was on the line to be included in the estimate. I told him we could not include that timber in the estimate until the timber was put in place. McGillis said he had bought all the timber and had got to pay for it and would
220 like to have it in his estimate. I told him we could only take it when put in place. He then had his October estimate. McGillis didn't say anything at the time about his work being underestimated. He made no other request than that the timber should be estimated. I saw McGillis again about the 20th of November. He had then abandoned the work at Momence and his office was closed. Mr. Taylor had charge of the office and I found him at Momence. When I got off the train about 100 men met me and demanded their pay for work done for McGillis & Co. Taylor told me he had commenced paying the men about the 15th, and had paid out about $1,500 to the men, when he stopped paying. He said he told the men that he paid out all the money he had and that Hogan had some money and he expected it would be given to him.

I saw the notice served upon the plaintiffs requiring them
221 to put on a sufficient force to complete the work, and when they failed to do this I commenced organizing to complete the work. We let a few sub-contracts, not very many, but did the work mostly ourselves. We sublet the work for sections 19 and 20 on January 17, 1883. On December 14th we sublet to Fairchilds & Co. sections 22, 23, 24, and 25, inclusive; also another, January 15, for sections 31 and 32. The balance of the work was done by the construction company, but I can't state now the amount of work so performed. We did most of the work with trains. These contracts were let at the lowest and best figures we could get, and the work was all completed as economically as possible. I made the contract with Singleton for the grading on sections 15 and 16. This contract was made Jan'y 15, 1883. I had a conversation with Singleton relative to this work in Oct., 1882. I told him that I had no objections to making a change in the line, but that he must
222 secure the right of way first. No contract was made between Singleton, McGillis & Co. and the construction company for a change of line or for a new grade across those sections in October. The contract was made in January, the construction company agreeing to pay Singleton's company $5,000 for the grading, and this amount was paid to Singleton by the Western Air Line Construction Company. It cost the construction company to complete the work after the abandonment of the plaintiffs about $30,000 above the contract price. The entire work cost us about $30,000 more than it would have cost us under the contract with the plaintiffs. The contract with the plaintiffs was 20 cents a yard for the earth-work. The work that they performed before the abandonment of the con-

tract was mostly light work, leaving the expensive work to be completed. It cost us to complete this work about 35 cents per cubic yard.

It cost us for track-laying about $550 a mile instead of $400,
223 the contract price with McGillis & Co. The bridging cost us about $1,000 less than the contract price.

I met McGillis after he had abandoned the work and said to me that he and Hogan didn't get along together; that Hogan went off and didn't come back; that Hogan had drawn money out of the bank and retained and had gone away with a large amount of it.

I heard no complaint about the October estimate until I saw it in the notice served upon the company.

McGillis did not personally complain of the estimate until after the commencement of this suit. I have no knowledge that either of the plaintiffs nor that any one representing them requested a remeasurement of the work. I never heard of such a request.

Cross-examination:

I was at Kankakee early in January and heard that engineers were on the line measuring the work. I think I organized the construction company, made up the syndicate in New York, and
224 prepared the papers for the corporation. I had no interest in the railroad company until the contract was made for the construction of the line with the Western Air Line Construction Company. I was not an officer of the railroad company. J. D. Harvey was its president and Governor Merrill, of Iowa, was one of the directors. Mr. Holt and Mr. Speis, of New York, were directors. Governor Merrill first brought the matter to my attention. When I had that conversation with Singleton in October I had no interest in railroads, except as contractor. The construction company was to receive its pay in stock and bonds for the construction of the road. It did not have all the stock and bonds. I was not over the entire line before the contract was let to plaintiffs. Mr. Shaw went over it and reported the condition of the line to me. In my conversation with McGillis I told him I thought it would take at least $10,000 to enable him to carry on his work and meet his bills and pay-roll.

I told him I thought 20 cents a yard was very low for the
225 earth-work. I told McGillis all along in September and October that I didn't think he had force enough on the line to complete his contract. I saw McGillis several times in October at Kankakee and probably at Momence.

On the 11th day of November, 1882, I think I was in New York. I was there also on the 15th. I was not on the line between the 11th and 15th of November. I did not personally pay out the money for completing the line after the 15th of November. My son was cashier and he signed the checks.

Redirect examination:

I was not an officer or director of the railroad company in October or November, 1882. I was general manager of the completed part of the railroad prior to that time. I did not intend to say that

I saw McGillis receive his estimate. What I pretend to say is that Shaw was making up the certificate; that the amount was arrived at and they told him what the amount of the certificate was. I did not see the estimate until the estimate was made upon the certificate.

226 BLANCHARD was recalled by the plaintiff and testified as follows:

At the time Allison Co.'s men quit work the engineers told me that five sections of the work sublet to Allison & Co. were entirely completed and the others nearly done; there was very little more work to be done. On the 15th of November Allison & Co. were entirely completed and the others nearly done; on the 15th of November Allison's force were still at work.

We laid the rails below grade by the direction of the contractors. I saw the plaintiff for a few moments on the 12th or 13th of November, 1882, and was present at a conversation with Mr. Shaw. Mr. Hogan told Henry Shaw that he was going to quit work, and claimed that Shaw had not estimated all the work that he had done in October. He claimed he had no estimate for the track laid, nor for the earth-work done on section 9, and said if he did not get an
227 estimate on the track that he would quit. Mr. Shaw told him he was not entitled to an estimate on the track under his contract until he had 10 miles laid in accordance with the specifications. He did not claim that he had not sufficient estimate for earth-work, except on section 9. I was at work for the construction company, and was on the line when Taylor went over the work with the engineers, remeasuring the work after McGillis & Hogan had quit. I was at work on sections 10 and 11. I worked about 100 men from November 21 to Dec. 3 or 4.

Cross-examination of FOSTER HUDDLESTON:

I first went on the line in June, 1881; there was an old embankment on the line; looked as though it had been standing several years, and was washed so that it was in a kind of an oval shape.

Cross-examination of ROBERT DUNCAN:

I had been over the road a short time before to make an estimate to bid for the work. I made an estimate for Sommers and
228 Co. I made an estimate for the first twelve sections of the work; as near as I can remember it was about 30 cents per cubic yard for the earth-work and $600 for laying the track and surface-laying the same. When I commenced laying the work, McGillis & Co. were patching up the old grade, leveling it down with men and scrapers, on the sections 1, 2, 3, and 4.

JACOB T. CLINGER, called by the defendant, testified as follows:

I am a civil engineer by profession. I was connected with the building of the Plymouth, Kankakee and Pacific railroad. I had charge of

the earth-work on that line as an engineer, and the estimates were all made in my office. In 1880 I went over the line again; I was employed to go over the line by Frank P. Hawkins to make an estimate of the probable cost of finishing the grade so that it would be sufficient to receive the ties. We quit the old grade in 1871; this examination was in 1880.

229 A part of the old road bid upon—part of the old grade—ties could be laid on; upon part of the grade it was very good and other parts it was washed out. I went over the line for the purpose of estimating the probable cost of the work that would be necessary to make it ready for the ties. My recollection is that I estimated it would cost not to exceed $300 a mile, with the exception of two miles that were washed out. I went over it again in 1881 and could see but little difference or little change since 1880.

Cross-examination:

The old grade was built in the year 1871. From North Judson to San Pierre it was built up to grade, and part was not; from North Judson to San Pierre is six miles, and from San Pierre to Wolf Marsh nine. This makes 15 miles with the earth-work up to grade; then two or three miles were partially done.

HENRY M. SHAW, a witness called by the defendant, testified as follows:

230 I was chief engineer of the Western Air Line and Construction Company at the time it built the Indiana, Illinois & Iowa road. The entire line—cross-sections 1 to 46—was cross-sectioned before McGillis & Co. worked. My assistants were competent engineers and made reports to me; went over the calculations myself and know they were correct.

McGillis & Co. commenced work 15th September, 1882. Sections 1, 2, 3, and 4 they filled in in places in the embankment where it had been tramped down by the cattle, but in the majority of cases they smoothed over the old embankment and laid their track on the old grade. After that they hauled dirt back from section 3 to surface and filled the track. In some places it was made a foot below the grade. The grade was never raised in those sections. The stakes they speak of were not grade stakes, but were substakes for the laying of rails. I went over the line in 1881 from North

231 Judson to Momence. I went over it for the purpose of making a report to John Drake of the condition of the old road-bed. Most of the embankments were in a fair state of preservation. Of course the edges were rounded off and they presented a round or even surface on top. In marshy places the embankments were nearly obliterated, but still a line could be placed there very easily. I should judge there was 70 or 80 per cent. of the work intact on that portion of the line.

From the condition of the old bank and cuts I know it would be impossible for engineers, after work had been done upon it covering up those banks, to measure it so as to tell the amount of new work

that had actually been done. This could not be done unless they had the original levels or cross-sections notes. These crossed-sectioned notes would show the original contour of the earth-work. They could not make calculations from the slope stakes.
232 These slope stakes might show five feet of fill where there was actually four feet of the old embankment left, and they would have no means of finding out the extent of the old embankment without the original cross-section notes, and this would be the same in cuts. I made the figures upon the original profile; they represent the quantities taken within the prism of the road-bed—that is, the quantity between the slope surface and grade line as shown by the cross-section notes. These figures do not represent the entire amount of the work as it will be eventually completed. There will be the necessary side ditches or drainage, public and private road crossings, foundation beds, depot grounds, side tracks, etc. I never told Mr. Falsey or Mr. Blanchard that the figures represented the exact amount of required earth-work. Mr. Whitzel was my chief assistant engineer; Charles Miller had the division east of Momence, and Lewis Shaw had charge of the second division. They made the
233 monthly estimates of work done by the contractors. These estimates were fairly made between the defendant and the contractors. I had no knowledge of collusion or fraud and there was none upon my part with the company in making these estimates.

Neither General Drake or any officer of the construction company ever talked to me about the manner in which I should make these estimates or the amount that should be given. This matter was left entirely with me. The estimate sheet for the October work was given me on the 3rd or 4th of November. I took it to Momence and gave it to Mr. Taylor, and McGillis came to my office a few days afterwards. He was there on the 4th or 5th of November. The first thing he asked me was whether I had given Allison & Co. an estimate, and I told him no, and he said, "I shall not. I would not do it." He would rather they would get their estimate from his office. He then asked me if I would estimate the bridge timber that he had purchased and were on the right of way. I told
234 him I could not do it under the terms of the contract. He asked if I thought General Drake would advance him any money for that. I told him I did not know, but would ask him, and stepped into the General's room and he came out and they had a conversation about the matter. He never made any complaint to me in regard to the earth-work before he quit work. I never said to McGillis that his estimate was not one-half what it ought to be. I never used that expression, but what I did tell him was that he had not a sufficient force to complete his contract by the 1st of January, and that he should have had twice that amount of work done by that time in order to complete his contract. He said that a large force was going to work soon. He never claimed to me that I had under-estimated his earth-work or had acted fraudulently with him prior to the bringing of this suit. I left out of his estimates sections 15 and 16, as it was not work con-

templated in the contract at all. None of it was on the line and staked out in cross-sections. All the papers connected with
235 the work in the company's office at Kankakee were burned in November, 1883. I saw Hogan, McGillis' partner, on the 13th or 14th of November, at Momence, and he wanted to know why I had not given him an estimate for track-laying; told him they were not entitled to it; it was not brought up to grade, and that under the contract he was not entitled to an estimate for track laid until 10 miles had been completed. Hogan said if I did not give him an estimate on the track he would pull his men off the work. The men were pulled off that night. He made no claim as to the other work not being sufficiently estimated.

Cross-examination:

The estimates of the work done in October and the measurements were made by my assistants. They brought their estimates to my office and I then supervised them. I went over this line of road in May, 1881, at the request of General Drake. When McGillis
236 and Co. quit work they had not brought sectional 2 and 3 up to grade. If the cross-section notes and level books of the original survey of the old bank had been destroyed there would be no way of appr-ximating the work that is put on top of the old bank. If the slope stakes and the original grade stakes are still left standing, there still would be no way of approximating how much new earth had been put upon the old bank—no way to do this unless you dug in and discovered the old bank and recross-sections. You would have to be sure to get all the inequalities before you could accurately measure them. There is no way of making the measurement unless you disclose the old bank. I have examined the notes made by Devore, Nelson, and Taylor; they are made in the way I should make them. They have taken the average of the slope-stake heights, which is an incorrect way of finding the center height. They have taken the average of the slope-stake heights to find the centre, which is an incorrect way. It will make the center height too
237 much. In making the monthly estimate- we generally aim to make them liberal—liberal to the contractor. I am not in the employ of either — railroad or the construction company. I am living permanently at Chattanooga. There is no arrangement by which I am to return as chief engineer, and there has been no talk of that kind. The profile was intended to show the elevation right at the top of the old grade. If the side of the old grade were shown that profile would show over it.

The defendant then called John K. Crosswell as a witness, who testified that he was a civil engineer and had been since 1850, engaged in the construction of railroad work and other work connected with the profession.

I was over the old road-bed between Momence and the State line in 1880. To let this work of repairing the old road for the superstructure it would be necessary first to cross-section the work,
238 if they wanted to get it with any accuracy; there would be

no difficulty in getting at the quantity with accuracy, although it would be more tedious than the new work. I was called on by the construction company to measure the work about the middle of November, 1882. I first required all the engineer notes and cross-section notes, profile and field books, so that I could get at the original surface and also the original quantity; these were furnished me. I had everything in connection with the land that I could conceive of that would enable me to measure the work. I measured first twenty-five sections from Momence east; I had with me as assistants Carl Miller, O. C. & Jas. Whitsell, & two men hired at Momence—five to six men. I measured the new work done by McGillis & Hogan; it did not include the original work; it did not include anything embraced in track laid. I took notes and made my computation after the measurement and returned all the notes, original measurements,
239 estimate, and the cross-section notes to the company at its depot building in Kankakee. I had one copy that I retained myself of my work. I know that the depot building was afterwards burned. My measurement included all work done by the plaintiffs up to November 15. The total clearing was six acres and $\frac{16}{100}$ of an acre; $\frac{70}{100}$ of an acre was allowed for clearing prior to November 1st, so that after Nov. 1st there was $\frac{46}{100}$ acres of clearing. Three stations of grubbing allowed after Nov. 1st. The total amount of earth-work allowed to Nov. 15th was 35,987 cubic yards. There had been allowed to Nov. 1st 26,628 cubic yards, so that would leave, as done in November, 9,359 cubic yards. The total amount of piling in place Nov. 15 was 3,670 thousand feet; the total amount of lumber in place, 75,324 feet, board measure. There had been allowed to Nov. 1st, 56,416 feet; the amount during November, 18,908 feet. Total amount of iron, 3,351 lbs., and allowed to Nov. 1st, 2,474 lbs.; the amount furnished in November, 877 lbs. The total
240 amount of track laid was five miles and $\frac{6633}{1000}$; of this, 6,001 feet I call finished. I was engaged 10 days in making these measurements. Without the cross-section notes and other data furnished me the work could not have been measured at all. I don't think any work had been done in the cut in section 4. I had seen the cut before, and I don't think any work had been done in the prism of the road.

I made a measurement again of the whole line in October and November, 1883, after the road was completed. I used the same cross-section notes and levels as when I made my first measurement. The original quantity as shown by the profile was 188,851 cubic yards. The original quantity is the amount of work to be done. The amount of work actually done was 176,745 cubic yards.

The witness here furnished a tabulated paper showing the amounts of work to be done and the work actually done as testified to by him by sections. The same was introduced in evidence as
241 the copy made by him before parting with the original estimates, cross-section notes, and other engineering field notes to the defendant corporation, and is as follows:

Final estimate and statement of work done and materials furnished up to November 6th, 1883, on sections one to forty-six, inclusive, of the Indiana Division.

Section.	Clearing.	Graduation.				Timber work.			Track-laying.				Remarks.
		Grubbing stations.	Earth-work.			Bridging, cattle-guards, &c.			Feet in main track.	Feet in transfer and side tracks.	Total amount when completed.	To be done—filling.	
			Original quantity.	Work done.	Work to do.	Piling, lineal feet	Timber & lumber, M, B. M.	Iron.					
	Acres.		*C. yards.*	*C. yards.*	*C. yards.*			*Lbs.*			*Miles.*	*C. yards.*	
1	0.05	------	3,570	3,570	------	------	17,159	529	5,601	448	1.145	------	C. & E. I. R. R. transfer.
2	0.05	------	6,209	5,908	301	561	36,726	1,621	5,300	------	1.004		
3	------	------	4,742	4,742	------	444	12,278	487	5,300	------	1.004		
4	------	------	2,022	2,022	------	------	1,880	61	5,300	------	1.004		
5	------	------	3,170	2,944	226	11,93	24,230	1,010	5,300	682	1.133	164	Spur track at Castleton.
6	------	------	4,767	4,202	565	379	11,262	498	5,300	------	1.004		
7	0.70	------	3,649	3,125	524	------	------	------	5,300	------	1.004		
8	1.40	------	1,498	1,133	365	------	60	1	5,300	408	1.080	------	Spur track at Sinville.
9	1.72	------	2,575	2,384	191	784	16,748	857	5,300	------	1.004	45	
10	1.46	------	2,963	2,963	------	264	7,040	364	5,200	------	0.985	33	
11	------	------	4,040	4,040	------	1,006	19,522	1,063	5,300	------	1.004	45	
12	------	------	5,841	5,841	------	576	15,302	727	5,300	------	1.004	135	
13	0.08	------	4,060	4,060	------	256	5,842	309	5,300	------	1.004	229	
14	------	------	4,849	4,849	------	554	17,012	777	5,300	------	1.004	130	

Western Air Line Construction Company, Building the Indiana, Illinois and Iowa Railroad—Continued.

Sections.	Clearing.	Graduation.				Timber work.			Track-laying.				Remarks.
		Grubbing stations.	Earth-work.			Bridging, cattle-guards, &c.			Feet in main track.	Feet in transfer and side tracks.	Total amount when completed.	To be done—filling.	
			Original quantity.	Work done.	Work to do.	Piling, lineal feet.	Timber & lumber, M, B. M.	Iron.					
			C. yards.	*C. yards.*	*C. yards.*			*Lbs.*			*Miles.*	*C. yards.*	
15	------	------	8,221	8,221	------	596	18,396	851	5,200	------	0.985	80	
16	------	------	10,588	7,726	2,782	------	------	------	5,300	------	1.004	150	
17	0.67	------	4,559	4,066	493	160	5,436	238	5,300	1,502	1.287	482	Transfer track at Shelby.
18	------	------	4,699	4,196	503	1,275	83,963	4,605	5,300	------	1.004	345	
19	1.33	------	13,825	13,825	------	1,171	77,261	4,295	5,300	------	1.004	22	
20	------	------	4,030	3,438	592	144	2,880	154	5,200	------	0.985	7	
21	0.63	------	2,869	2,384	485	225	4,688	241	5,300	------	1.004		
22	2.03	------	4,075	4,075	------	144	4,946	173	5,300	------	1.004	55	
23	2.93	6.75	9,368	9,368	------	225	6,074	257	5,300	------	1.004	125	
24	6.95	11.50	9,966	9,966	------	108	6,074	162	5,300	1,105	1.212	250	Side track at De Motte.
25	6.98	7.05	4,342	4,271	71	144	5,516	171	5,200	------	0.985	240	
26	1.20	3.00	2,708	2,546	162	247	7,240	384	5,300	------	1.004	70	
27	5.30	12.50	2,620	2,260	360	------	1,512	3	5,300	------	1.004	110	
28	3.00	14.00	1,811	1,667	144	130	4,304	228	5,300	------	1.004	10	
29	5.70	6.00	4,007	4,007	------	------	1,896	10	5,300	------	1.004	75	
30	2.80	2.80	3,428	3,048	380	252	5,592	254	5,200	------	0.985	125	
31	1.80	2.50	4,606	3,811	795	541	7,040	355	5,300	------	1.004		
32	1.84	2.00	3,272	3,272	------	------	2,300	15	5,300	1,220	1.234	303	Side track at Wheatfield.

33	0.69	2.00	1,270	1,270	-------	136	4,964	228	5,300	-------	1.004	95	
34	6.44	11.00	4,866	4,758	108	136	6,617	236	5,300	-------	1.004	70	
35	6.90	3.00	3,028	3,028	-------	220	8,122	320	5,200	-------	0.985	130	
36	2.30	2.00	1,941	1,941	-------	-------	985	4	5,300	-------	1.004	100	
37	2.30	1.50	3,064	1,365	1,699	-------	4,205	127	5,300	371	1.073	38	Side track at Dunnville.
38	0.92	2.00	1,588	1,323	265	-------	3,916	22	5,300	826	1.160	62	" " "
39	2.76	2.00	1,034	471	563	-------	2,264	101	5,300	-------	1.004	145	
40	2.99	5.00	2,384	2,384	-------	-------	4,344	55	5,200	-------	0.985	30	
41	2.30	-------	2,220	2,220	-------	84	5,276	109	5,300	-------	1.004	15	
42	0.46	-------	2,064	1,532	532	84	3,988	106	5,300	269	1.055	-------	Side track at San Pierre.
43	1.84	-------	1,359	1,359	-------	84	5,638	178	5,300	892	1.173	-------	" " "
44	6.73	2.50	2,031	2,031	-------	-------	2,298	12	5,300	-------	1.004		
45	3.68	4.00	2,172	2,172	-------	84	6,326	121	5,200	-------	0.985		
46	2.64	4.50	6,961	6,961	-------	168	9,382	202	8,436	3,997	2.354	404	Transfer and side tracks at North Judson.
	89.67	107.60	188,851	176,745	12,106	12,375	498,504	22,521	246,443	11,720	48.894	4,319	

243 The above papers were admitted in evidence subject to defendant making proof of the destruction of the original documents from which it was compiled and made. The witness stated that it showed the total work done in each of the 46 sections and said that it was correct without any doubt.

Total in sections 1 to 25, inclusive, 123,319 cubic yards; * * * 26 to 46 * * * 53,426 * * *

On the cross-examination the witness said that if the original figures and information given him were correct his measurement was correct. I have some knowledge of the correctness of the original measurements. We run continuous levels the first time and I checked up the original levels, so I know their through line of levels was correct. I had no means of testing the correctness
244 of the general contour of the ground, except upon the basis of the measurements made and furnished me; I relied upon their accuracy. I made an examination of the original cross-section memoranda. I followed their computations and examined the mode of keeping their notes and examined them generally; to a very large extent I trusted to their statement. I measured the cuts on the bank, but did not measure them as borrow pits. I did not think that was included in the contract; understood these measurements and papers were made for the purposes of the suit and considered them valuable, and, as I had no safe, put them in a market basket, together with the cross-section notes and field books, and delivered them to T. P. Shontz, and he and I put them in a cupboard in the depot building of the company.

On the redirect the witness said that he got his information from the notes, and not from what the engineers told him. This
245 is the only work I have done for the construction company.

The defendant next called as a witness T. P. Shontz, who said he was superintendent of the Air Line Construction Company. The papers of the Western Air Line Construction Company connected with the building or construction of the road were kept in a basket in an unlocked cupboard in the train-master's office in the building which we used as the general offices of the company, two stories high & 28 by 54 or 55 feet. The papers belonging to the engineering department were kept in the same place with the others. All of these papers were burned at the fire. Witness said he considered the papers valuable and important.

On cross-examination the witness said: They had a safe in the office, and the most valuable papers were in the safe; it was full of the general books and vouchers.

F. E. Drake, called by the defendant, said that he was cashier and book-keeper, in 1882, of the Western Air Line & Construction Company. This witness also testified as to the loss of the papers
246 connected with the engineering department, including the cross-section notes and other papers, which were burned at the fire; that the fire occurred January 17th, 1884, in the night time;

that he did not know of it until the next morning; that the cross-section notes, field books, and other papers belonging to the engineer's department were kept in the cupboard. The building burned was an isolated building used as the defendant company's general offices.

The defendant next called Oliver T. Whitsell as a witness, who testified that he was a civil engineer, and had had charge of construction work on railroads a considerable portion of the time since 1868.

In 1882 and '3 I was assistant engineer, and had immediate charge of the whole line between Momence and North Judson. My assistants were Charles Miller, who had charge of the first 25 miles, and Robert Gregg, who had charge of the balance. I made my reports to Henry Shaw and my assistants reported to me. The original cross-section work was done by my assistants and reported to
247 me. I examined this work and was satisfied that it was correctly done and accepted it as correct.

I was over the old road-bed before any work was done. With those cross-section notes before me I could accurately measure all the new work done that was done upon the line, and could accurately measure all the work done by McGillis & Co. up to the 15th of November. Without those cross-section notes I could not measure it; with the grade stakes and slope stakes all standing I could not accurately measure their work without the cross-section notes. I made a measurement of the work done by Allison & Co. in October. The amount was 25,408 cubic yards. About the 15th of November I measured this work again; they had then done a total of 39,047 cubic yards. The amount done by them between the 1st and 15th of November was 13,609 cubic yards. This measurement was accurately made.

I was with Croswell when he made the first measurement of the first 25 sections of the road; that measurement, according to the best of my judgment and knowledge, was accurate. The
248 work done by McGillis & Co. was the least expensive of the work; it was generally upon dry ground. I remained on the line, after McGillis & Co. left, until February, 1883. The timber left by them on the line that was not in place was levied upon for the debts of McGillis & Co. and taken away. I was present at a conversation between Hogan and Mr. Shaw relative to the October estimate. Mr. Hogan objected to the estimate because he had not been estimated anything for the track he had laid. He said he would abandon the work if the track was not estimated to him; he did not make any objection to the estimate of earth-work. This conversation was at Momence, and was near the middle of the month of November, before he abandoned the work. When the iron was laid by the plaintiffs the track was not up to grade. They laid the iron so as to reach the sand cut, for the purpose of taking material for filling, by train.

On the cross-examination the witness said he entered upon the work on the 4th of September, 1882. A line east of the river

249 was cross-sectioned after I went upon the work. There had been a preliminary cross-section work before.

I commenced cross-sectioning on section 19. The work west of the river had been cross-sectioned before. The measurements for the October estimates were made under my supervision. They worked upon about thirty miles of the road in October. I only know the correctness of the measurement west of the river by the reports made to me by my assistant, Gregg. I made my calculations from his figures. This estimate was completed along about the first of November. It was before the 9th, I think. The October estimate was in my handwriting. I was over the entire work about the 15th of November. On the 15th of November there was not a single mile, from section 25 up to 46, inclusive, that was completed. I was with Mr. Crosswell on the west twenty-six sections of the road when he made his measurement in November. I had already measured the east twenty sections. Allison & Company's men were then at work. The figures on the profile are only approximate
250 figures or preliminary estimates, and if these figures are in excess of the work actually done that would not condemn the work of cross-sectioning. In case a contractor abandons his work partially performed, if it is to be relet, we go on and measure the work first—measure the amount to be done. By the measurement you can readily tell how much work has been done, and then estimate the amount necessary to complete the work. I came back and assisted Mr. Crosswell in his final measurement. The final estimate sheet of Crosswell is correct, to the best of my belief.

The defendant then called as a witness C. A. Miller, who said that he was a civil engineer and had been since the Fall of 1880, and was employed by the Western Air Line Construction Company, under Mr. Whitsell, in 1882. I had charge of the first twenty-two sections of the lines east of Momence—twenty-two miles. I was upon the line all the month of October. I helped to make estimates for the October work. The estimate was made in the usual
251 manner and was correctly made, and, so far as I know, was a full estimate of the work done. In the spring of 1882 I helped to cross-section a part of the line. This work was done in the usual manner, with the rod and level and tape, the grade line being our base line from which the measurements were taken. It was done for each station, and between stations wherever it was necessary; a station is a hundred feet long. Wherever there was an inequality of surface it was shown. On my division there was not a single section of grading completed on the first of November.

On the cross-examination this witness said he did the work of cross-sectioning very carefully; noticed all the inequalities; took measurements wherever the inequalities made it necessary. In making estimates of work done I always gave the contractor the benefit of the doubt; this was my rule.

Defendant next called Robert Gregg as a witness, who said he was a civil engineer, and commenced in the fall of 1880; he was
252 employed by the defendant in 1882; he was assistant to Mr. Whitsell. I had the east division, from section 24 to 46, inclusive; I assisted in cross-sectioning the work. Allison & Co. commenced early in October. I made the measurements for the October estimates, and returned them to Mr. Whitsell. To make this estimate we run our centre line levels, and from that computed the monthly estimates; this included all the work they had done up to the end of the month. I helped Whitsell make the measurement after McGillis & Co. quit the work, about the middle of November; there was not then a section completed so that it could be received by the engineer.

The defendant next called Lewis Shaw as a witness, who testified that he was an engineer, and that he did his first work in 1867, and had been engaged steadily since; is now on the Chicago, Burlington and Northern road. I helped to do the final cross-sectioning of the road in April or May, 1882; this work was accurately
253 done.

The defendant next called F. X. Longpre, who said he was a farmer, and resided at Momence. He was a highway commissioner in 1882. I know the cut in section 4; this cut, before they commenced the new work, was used as a highway; the road was wide enough for two teams to pass; the cut was between four and five feet deep, and was about fifteen rods long; the track was laid through this cut about on a level; in some places it was shoveled off a little; they did not take out any dirt in the first cut.

The defendant next called as a witness William Parish, who testified that he was a farmer and owned the land immediately south of the right of way through the two sand cuts east of Momence; knew the condition of the road in 1882, before McGillis & Co. commenced work. The first cut was about twenty rods long and averaged about two feet deep; at the bottom it was about sixteen feet in width. The second cut was between 50 and 60 rods long and, on an
254 average, about 5 feet deep.

The defendant next called Edwin Fletcher as a witness, who said that he was time-keeper and paymaster on the work after it was abandoned by McGillis & Co., and assisted in prosecuting the work from section 1 to 46 after McGillis & Co. abandoned the work. I paid the men every month; I have the vouchers here for money paid the laborers, which were offered.

T. P. Shontz was recalled and said that he looked after the completion of the work generally after the plaintiffs abandoned their contract.

The defendant paid for the completion of the work as follows:

For clearing	$458 25
" earth-work	48,724 90
For bridging	13,997 40
" track-laying & surfacing	22,448 78

The witness also made a computation of what it would have cost the defendant for the construction of the work under the McGillis & Co. contract as follows:

255 For clearing	$1,793 40
" earth-work—there were 176,745 cubic yards, at the contract price of 20 cts. per yard—would have amounted to	35,349 00
For bridging	12,375 00
" piling	3,712 50
" iron	13,521 26
" track-laying and surfacing	19,557 60

The aggregate cost in excess of the contract price was $22,225.93. On cross-examination, the witness said that the work was not completed until September, 1883.

The defendant then offered in evidence orders issued by the plaintiffs in favor of their men for work done in October and November, amounting to $3,430, which was paid by defendant.

Henry Shaw, recalled, testified that neither McGillis nor Hogan, nor anybody representing them, after the October estimate, made any request for a remeasurement of the work, nor did they request an inspection of field notes or cross-section notes. He said he
256 neither gave Whitzel nor other engineers special directions with reference to the measurement of the work for monthly estimates, and that he never received any directions from the construction company.

H. A. Wheeler was next called as a witness by the defendant, and stated that on the 16th of November he made an inquiry for Hogan and McGillis, but could not find either of them; that he then went up to Momence and went to their office and found Taylor about 4 o'clock in the afternoon of that day and delivered to him the notice that has been read in evidence. This was on the 16th of Nov., about 4 o'clock in the afternoon. I had a conversation with McGillis and he said he received it from Taylor on the 17th.

It was admitted by plaintiffs' counsel that the evidence of Taylor and Nelson at the former trial, as read to them on this trial by defendant's counsel on these respective cross-examinations, was correct.

257 The defendant then offered in evidence the October estimate, in the words and figures following:

WESTERN AIR LINE CONSTRUCTION COMPANY,
OFFICE AT KANKAKEE, ILLINOIS.

To W. A. McGillis & Co., Dr., for work & materials furnished on sections one to forty-six, inclusive, of Ind., Ills. & Ia. R. R. up to Nov. 1, 1882, as follows:

Quantity in month of October.	Total.	Description.	Price.	Amount.
43,062	52,036 cub. yds.	Earth-work	20	10,407 20
53.5	53.5 acres	Clearing	2 00	1,070 00
78.3	78.3 stas.	Grubbing	5 00	391 50
1,465	1,465 lin. ft.	Piles driven	30	439 50
55$\frac{744}{1000}$	56$\frac{416}{1000}$ M, B. M.	Tim. and lum. in place	27 50	1,551 44
2,474	2,474 lbs.	Iron bolts, spikes, &c., in place	06	148 44
Total				14,008 08
Deduct 10 per cent.				1,400 81
Balance				12,607 27
Deduct previous payments				1,631 95
Am't due				$10,975 32

I hereby certify that the above estimate, amounting to ten thousand nine hundred seventy-five and $\frac{32}{100}$ dollars, is correct.

HENRY SHAW,
Chief Engineer.

Received from the Western Air Line Construction Company by Central Trust Company, treas. of construction, the sum of ten thousand nine hundred and seventy-five $\frac{32}{100}$ dollars in full of the above account.

Nov. 10, 1882.

W. A. McGILLIS & CO.

258 Also the September estimate of work performed under the contract in the month of September. of the same form and character, showing 8,974 cubic yards of earth-work, 672.1000 feet of lumber in bridges, amounting in the aggregate, $1,813.28, which was receipted by the plaintiffs.

The defendant here rested.

The plaintiffs recalled the plaintiff McGillis, who testified that he received his October estimate on the 9th of November and got his check on the 10th.

259 I did not see General Drake on the 9th or 10th. I had no talk with Shaw about the estimate at that time. I don't recollect that I had any conversation with Shaw or Drake about the estimate prior to the 9th of November.

Plaintiffs recalled Henry Shaw. He testified that the entire amount of work done by McGillis & Co. before they abandoned their contract was about 73,000 cubic yards, and it left 115,000 cubic yards to be done. This was afterwards done by the construction company.

And this was all the evidence offered in the case.

260 Inasmuch as the matters aforesaid are not of record in said cause the said defendant presents this its bill of exceptions and prays that the same may be signed and sealed by the court, which is accordingly done this 20th day of October, A. D. 1887.

I further hereby certify that the attorney of the above-named defendant presented a bill of exceptions in the above-entitled cause prior to the 20th of September, 1887, under a stipulation, which reads as follows:

"It is hereby stipulated by the parties to the above-entitled cause, through their attorneys, that the bill of exceptions in said cause may be filed on or before the 20th of September next (1887) as of the date of judgment entered in said cause.

"Chicago, July 23, 1887.

"JOHN S. COOPER,
"Att'y for Pl'ffs.
"E. WALKER,
"Att'y for Def't."

The attorney of the plaintiff- being present and objecting to such bill as presented, and that the attorneys for the respective parties, up to the time of the signing of the above stipulation, had agreed from time to time for the extension of time in which to present and file such bill of exceptions; that thereupon plaintiffs' attorney undertook to prepare and did prepare a transcript of the plaintiffs' evidence, to be embodied in said bill of exceptions, and submitted the same to the attorney for the defendant on the 17th of Sep-
261 tember, 1887; that on the 20th of September last and for some days prior and subsequent thereto I was absent from the city, the court not being in session; that upon my return to the city the defendant's attorney again presented the bill of exceptions, requesting to have it signed and sealed. At that date the plaintiffs' attorney was absent from the city, and I directed defendant's attorney to submit the bill of exceptions as prepared to plaintiffs' attorney for his approval; that on the 11th of October the bill was again presented to me, and, upon the statement of defendant's attorney that it was satisfactory, I signed the bill of exceptions and directed it to be filed as of the date of the judgment. On the 13th of October, being informed by plaintiffs' attorney that the bill of exceptions

was not satisfactory, I directed the clerk to defer preparing the transcript of record until the parties could be heard, which was done.

On this day, October 20, 1887, the attorneys for the respective parties appear and agree that the bill of exceptions as now prepared is correct, but said attorneys for plaintiffs object to said bill of exceptions being filed.

WALTER Q. GRESHAM,
Circuit Judge.

262 *Bill of Exceptions.*

And be it further remembered that, after argument by counsel, the defendant requested the court to give the following charges, to wit:

The defendants respectfully request the court to instruct the jury that the plaintiffs' evidence does not sustain their cause of action, and that they should therefore return a verdict for the defendant for the following and other causes, to wit:

First. The material averment in the declaration is the fraud of the defendant in the monthly estimates given plaintiffs for the work prosecuted under the contract in question. This charge of fraud is the very foundation of the plaintiffs' cause of action and is not sustained by the evidence.

Second. If the plaintiff alleges fraud it must be clearly and satisfactorily proven, and the onus is upon him to prove his case as stated in the declaration. If the fraud charged is not strictly and clearly proved as it is alleged, there can be no recovery. The evidence introduced by the plaintiffs does not impeach the monthly estimates of the engineers and fails to show that such estimates were either fraudulent or so grossly erroneous as to necessarily imply bad faith upon the part of the engineers who made such estimates.

Third. Under the contract the questions now in controversy between the parties were, by the terms thereof, referred to the engineers, and their decisions were to be final and conclusive.
263 These estimates have been furnished, and both parties, by the terms of their contract, are to abide by those decisions or estimates, unless the evidence will clearly warrant the court in setting aside the estimates for fraud or for such gross mistakes as necessarily imply fraud.

If the court shall refuse the preceding request then the defendant requests the court to withdraw from the consideration of the jury all the plaintiffs' evidence of the number of teams and number of shovelers employed by them in the construction of said road under their contract, and the estimate of the amount or number of cubic yards of earth-work that such laborers and such teams were capable of removing, for the reason that such evidence is vague, indefinite, and irrelevant and is wholly insufficient for the purpose of impeaching the verity of the estimates made by the engineers in charge of the work.

The defendant also requests the court to charge the jury that in ascertaining the amount of work performed by the plaintiffs under

their contract in the month of October they must first consider the estimates of the engineers in charge of the work as *prima facie* evidence of the amount of work performed by plaintiffs, and that such estimates are conclusive of the amount of work so performed, and the plaintiffs are bound thereby, unless the jury believe from the evidence that such estimates were fraudulently made with the intent to deceive and wrong the plaintiffs, and the evidence of such fraudulent intent must be sufficient and conclusive.

264 That the court also charge the jury that if from the evidence they should find that the estimates of the engineers for the work performed by the plaintiffs in the month of October were falsely and fraudulently made by the engineers for the purpose of injuring and defrauding the plaintiffs, and the plaintiffs are not for this reason concluded by such estimates, they must also find from the evidence that the defendant, The Western Air Line Construction Company, or its authorized officers or agents colluded with such engineers and directed such false and fraudulent estimates to be made, or that they had knowledge of such false and fraudulent estimates; otherwise you must find for the defendant; that the defendant is not bound or prejudiced by the fraudulent estimates of the engineers unless it directed such fraud or was a party thereto or had knowledge thereof.

Relative to the amount of work actually performed by the plaintiffs before the abandonment of their contract, the court is requested to instruct the jury that the best and most certain evidence of the amount of work so performed is evidence of the measurement of such work by competent and skillful engineers; that both parties have given evidence of the measurement of such work by engineers who are witnesses upon the part of the respective parties; that the jury should also consider such evidence and reconcile the differences in the estimates of measurements of such engineers, if possible; that they should consider the times at which such estimates were

265 respectively made; also whether each corps of engineers had before them the data from which they could accurately make such measurements; that they should consider all the evidence relative thereto, and that the jury should not consider as certain or accurate the measurements made by the engineer of either party unless they believe that such engineers were furnished with such data as would enable them to make such measurements with reasonable accuracy; which instruction the said court refused to give to said jury and refused said requests, but, on the contrary, charged the jury as follows, to wit:

GENTLEMEN OF THE JURY: The plaintiff on the 6th day of September, 1882, agreed in writing with the defendants to construct and in every respect complete the grubbing, clearing, and grading, masonry and timber work, including the furnishing of materials and all other things necessary to complete forty-six sections or miles of road-bed of the Indiana, Illinois and Iowa railroad, and to prepare the same to receive the superstructure, and to lay, line, and surface the track.

A schedule accompanied the contract as a part of it, which specified how the contract was to be performed. The defendant agreed

to pay the plaintiffs monthly for the work done and materials furnished on the certificate of the defendant's engineer of the work done from month to month, less ten per cent., which was to be retained for defendant's protection until the final settlement.

266 The plaintiffs were to be compensated as follows:

For clearing, per mile	$20 00
" grubbing, per 100 ft.	5 00
" earth-work, per cubic yard	20
" excavation, loose rock, per cubic foot	75
" timbers for cattle-guards, foundation of bridge abutments, per thousand, board meas.	27 50
" timber planks for trestle-work and piers, per thousand, board meas.	27 50
" timbers, planks in culverts, per thousand, board meas.	27 50
" piles, per lineal foot, including driving	30
" wrought iron, per pound	06
" cast " "	06
" laying, lining, and surfacing track, per lineal mile	400 00

The contract contained the following clause: "The work shall be executed under the direction and supervision of the chief engineer of the Western Air Line Construction Company and his assistants, by whose measurements and calculations the quantities and amounts of several kinds of work performed under this contract shall be determined and whose determination shall be conclusive upon the parties, and who shall have full power to reject all or condemn all work or material which in his or their opinion do not fully conform to the spirit of this agreement, and the said chief engineer shall decide every question which can or may arise between the parties in relation to the execution thereof, and his decision shall be final and binding upon both parties."

Shaw, the engineer, delivered to the plaintiffs a statement of the quantity and amount of the several kinds of work done under the contract during the month of October and for other periods.

267 There is some conflict in the evidence as to the date in November when the October statement, was delivered to the plaintiffs. This statement, showing the engineer's measurement of the work performed and the amount due or to become due therefor, was binding on the plaintiffs, unless it was purposely inaccurate or unjust to the plaintiffs or so clearly and grossly erroneous and unjust as not to be accounted for by mere error of judgment. The burden is on the plaintiffs to show by preponderance of the evidence that the engineer's estimates for work done and material furnished under the contract were wilfully too small, or that they were so grossly inaccurate and unjust to the plaintiffs as to necessarily imply bad faith. Absolute accuracy in measurement was not contemplated by the parties or required by the contract. Mistakes, however—I mean mistakes which would and did palpable and serious injury to the plaintiffs, if such are shown by the evidence to

have been made—should and did destroy the binding force of the engineer's estimate.

It was insisted on argument by defendant's counsel that even if the evidence showed that the engineer's estimates were fraudulent that he acted as the arbiter to both parties, and that the plaintiffs have not the right of action, because they failed to prove that the fraud or gross mistake in the measurement was called to the attention of the defendant, and that with knowledge of the facts it insisted upon the binding force of the estimates. If you believe from the evidence that the engineer's estimate and measurements
268 were wilfully too low or inaccurate, as I have stated, and that the plaintiffs for that reason abandoned the work and the contract and notified the defendant, then this action was not prematurely brought.

While Shaw, the chief engineer, by agreement, was made arbitrator between the parties of all controversies arising under the contract, it will be borne in mind that he and his subordinates were in the service of the defendant, and that any fraud or mistake permitted by them against the plaintiffs would inure to the defendant's benefit. It is for the jury to say whether there is any evidence that shows or tends to show that the defendant or its president manifested a willingness, before or since the commencement of this suit, to correct any mistakes in the engineer's estimates, if, in fact, mistakes are shown to have occurred, wilfully or otherwise. The plaintiffs are entitled to payment for all the embankment and excavation contained within the grade, slope, and surface lines of each and every section; but for excavation beyond these lines they are not entitled to payment.

If you find, then, that the plaintiffs have successfully met and overthrown the engineer's estimates, you will return a verdict for the plaintiffs for the amount of work done by them and materials furnished under the contract, less any sums which they received from the defendant from time to time in payment and less any outstanding notes or obligations of the plaintiffs which the defendant
269 acquired by purchase before the commencement of this suit.

And if you find that the plaintiffs abandoned the work and the contract without good cause, and that the defendant in completing the work was obliged to pay out more money than the work would have cost, according to the terms of the contract, if it had been faithfully performed, then the defendant is entitled on his counter-claim in the way of damages for the difference between what the work would have cost under the contract and what it actually cost.

There was some controversy between the parties as to sections 15 and 16. It was insisted by the plaintiffs that by a subsequent verbal agreement between them and the defendant, or the defendant's president, that the grade was changed so far as sections 15 and 16 were concerned. See, that is the place where the curve was changed, where the road was made straight, and where the plaintiffs had some contract with Gen. Singleton, whereby Gen. Singleton made the grade. If you believe from the evidence that a change of

that kind was made, as stated by the plaintiffs—that is to say, that Gen. Drake, representing the defendant, agreed to that change in the track, and if the plaintiffs, relying on that agreement, in good faith made the change, then they were entitled to pay for the work on that change in those sections just as if no change had occurred. It is proper to say, however, that that is practically eliminated from the case, as plaintiffs' counsel admit that they were paid for the work done on those sections.

270 You are the exclusive judges of the facts and the weight of the evidence. You may not be able to do exact justice between the parties, but by the exercise of your best judgment you can return a verdict to do substantial justice; more cannot be expected in a case like this.

If you find for the plaintiffs, the form of your judgment will be, We, the jury, find for the plaintiffs, and assess their damages at blank dollars.

If you find that there is a sum due the defendants—that is to say, if you find that the plaintiffs were not authorized under the circumstances to abandon the work and the contract, and that in contemplation of the work the defendant sustained damages, as I stated, then you will return a verdict for the defendant on the counter-claim, if the sum due the defendant exceeds the amount which was due the plaintiffs for the work actually done. You may retire, gentlemen.

To which said instructions or charge of the court, and also its refusal to give the said instructions moved for as aforesaid, the said defendant now excepts.

And the said defendant specially excepts to so much of said charge as instructs the jury that "Mistakes, however—I mean mistakes that did do serious and palpable injury to the plaintiffs, if such are shown by the evidence to have been made, should and did destroy the binding force of the engineer's estimate."

271 The defendant also specially excepts to the following part of said instruction, to wit:

"If you believe from the evidence that the engineer's estimates and measurements were wilfully too low or inaccurate, as I have stated, and that the plaintiffs for that reason abandoned the work and the contract and so notified the defendant, then this action was not prematurely brought."

And the defendant further excepts to the following charge, to wit:

"If you find, then, that the plaintiffs have successfully met and overthrown the engineer's estimates you will return a verdict for the plaintiffs for the amount of work done by them and materials furnished under the contract, less any sums," &c., &c.

The defendant also excepts to so much of said charge as refers to the controversy between the parties to sections 15 and 16 and to the contract with Singleton providing for change of grade.

And the said defendant, excepting to said charge and ruling of the court as aforesaid, prays the said court to sign and seal this its bill of exceptions, which is done accordingly.

Inasmuch as the matters aforesaid are not of record in said cause, the said defendant, Western Air Line Construction Company, presents this its bill of exceptions, and prays that the same may be signed and sealed by the court and made a part of the record, which is accordingly done this 28th day of October, A. D. 1886.

WALTER Q. GRESHAM. [SEAL.]

Endorsed: Filed Oct. 28, 1886. Wm. H. Bradley, clerk.

272 Afterwards, to wit, on the sixth day of December, 1886, there was filed in said clerk's office a bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, Western Air Line Construction Company, as principal, and Joel D. Harvey, of Cook county, State of Illinois, and Francis M. Drake, of Appanoose county, State of Iowa, are held and firmly bound unto William A. McGillis and James Hogan, for the use of John S. Cooper, trustee, in the full and just sum of thirty thousand dollars ($30,000.00), to be paid to the said William A. McGillis and James Hogan, for use of John S. Cooper, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of November, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately a term of the circuit court of the United States in and for the northern district of Illinois, in a suit depending in said court between William A. McGillis and James Hogan, for use of John S. Cooper, plaintiffs, and Western Air Line Construction Company, defendant, a judgment was rendered against the said

273 Western Air Line Construction Company for twenty-four thousand one hundred and sixty-five $\frac{57}{100}$ ($24,165.57) dollars, and the said Western Air Line Construction Company having obtained a record in said cause and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said William A. McGillis and James Hogan, for the use of John S. Cooper, trustee, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Western Air Line Construction Company shall prosecute its appeal to effect and answer all damages and costs if it fail to make

its plea good, then the above obligation to be void; else to remain in full force and virtue.

WESTERN AIR LINE CONSTRUCTION COMPANY, [SEAL.]
By GILES E. TAINTOR, *Vice-Pres't.*
FRANCIS M. DRAKE. [SEAL.]
JOEL D. HARVEY. [SEAL.]

Attest:
T. P. KONTS, *Sec't'y.*

Approved:
W. Q. GRESHAM,
Circuit Judge.

Endorsed: Filed Dec. 6, 1886. Wm. H. Bradley, clerk.

274 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein William A. McGillis and James Hogan, copartners doing business under the firm name and style of McGillis and Co., who sue for the use of John S. Cooper, trustee, are plaintiffs and Western Air Line Construction Company is defendant, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this fifteenth day of October, 1887.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY, *Clerk.*

275 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

The United States of America to the judges of the circuit court of United States for the northern district of Illinois, Greeting:

Because in the record and proceedings as also in the rendition of a judgment of a plea which is before you in said circuit court, between William A. McGillis and James Hogan, copartners, &c., plaintiffs, and Western Air Line Construction Company, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Western Air Line Construction Company, defendant, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your

seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, A. D. 1887, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this eighth day of October, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the 112th year.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY,
Clerk of the Circuit Court of the United States
for the Northern District of Illinois.

[Endorsed:] Supreme Court of the United States. Western Air Line Construction Company, plaintiff in error, *vs.* Wm. A. McGillis and James Hogan, copartners, &c., defendants in error. Writ of error. Copy deposited in the clerk's office of the U. S. circuit court for northern district of Illinois for use of defendants in error.

276 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

To William A. McGillis and James Hogan, copartners, &c., Greeting:

You are hereby cited and admonished to be and appear at a Supreme court of the United States to be holden at Washington on the second Monday of October, A. D. 1887, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein The Western Air Line Construction Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the said error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Walter Q. Gresham, judge of the 7th judicial circuit, this eighth day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

WALTER Q. GRESHAM.

277 [Endorsed:] Supreme Court of the United States. Western Air Line Construction Company, plaintiff in error, *vs.* Wm. A. McGillis and James Hogan, copartners, &c., defendants in error. Citation to October term, A. D. 1887. Served Oct. 13, '87.

STATE OF ILLINOIS, } ss:
County of Cook, }

Lincoln Brooke, being duly sworn, says that he duly served the within citation by delivering a true copy thereof to John S. Cooper, attorney for said defendants in error, on October 13th, 1887.

LINCOLN BROOKE.

Subscribed and sworn to before me this 21st day of October, A. D. 1887.

[Notarial Seal of Eugene T. Ryan, Cook County, Ills.]

EUGENE T. RYAN,
Notary Public.

Endorsed on cover: N. Illinois C. C. U. S. No. 1283. The Western Air Line Construction Company, plaintiff in error, *vs.* William A. McGillis and James Hogan, copartners, &c. Filed October 24, 1887.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1887.

No. 1283.

THE WESTERN AIR LINE CONSTRUCTION COMPANY,
Plaintiff in Error,

vs.

WILLIAM A. McGILLIS and JAMES HOGAN, COPARTNERS, &c.,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

MOTION TO VACATE *SUPERSEDEAS.*

JOHN S. COOPER,
ATTORNEY AND COUNSEL FOR DEFENDANTS IN ERROR.

EARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1887.

No. 1283.

THE WESTERN AIR LINE CONSTRUCTION COMPANY,
Plaintiff in Error,

vs.

WILLIAM A. McGILLIS and JAMES HOGAN, COPARTNERS, &c.,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

MOTION TO VACATE *SUPERSEDEAS.*

And now come the defendants in error in the above cause, by John S. Cooper, their attorney and counsel, and move the Court to vacate the *supersedeas* in the above cause, or for an order declaring that the appeal bond filed by appellant in said cause does not operate as a *supersedeas;* because the writ of error was not sued out or served within sixty days after the rendering of the judgment entered and complained of in said cause.

JOHN S. COOPER,
Attorney and Counsel for Defendants in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1897.

No. 1283.

THE WESTERN AIR LINE CONSTRUCTION COMPANY,
Plaintiff in Error,

vs.

WILLIAM A. McGILLIS and JAMES HOGAN, COPARTNERS, &c.,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Suggestions in support of motion to vacate *supersedeas*, etc., made on behalf of defendants in error.

JOHN S. COOPER,
ATTORNEY AND COUNSEL FOR DEFENDANTS IN ERROR.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1887.

No. 1283.

THE WESTERN AIR LINE CONSTRUCTION COMPANY,
Plaintiff in Error,

vs.

WILLIAM A. McGILLIS and JAMES HOGAN, COPARTNERS, &c.,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Suggestions in support of motion to vacate *supersedeas*, etc., made on behalf of defendants in error.

I.

Statement of Facts.

On May 6, 1886, at the adjourned May term of the Circuit court, after the regular December term, 1885, a verdict was rendered by the jury in favor of the defendants in error.

(Rec., p. 45.)

May 19, 1886, plaintiff in error filed a motion for a new trial.

(Rec., p. 54.)

October 28, 1886, at the adjourned October term of the court after the regular July term, the motion for a new trial was overruled by the Court and judgment entered on the verdict.

(Rec., p. 47.)

On October 28, 1886, and on the same day, the bill of exceptions, *covering only the Court's charge to the jury, was signed by the Circuit Judge.*

(Rec., pp. 133-138.)

December 6, 1886, plaintiff in error filed its appeal bond, conditioned as in cases where the bond operates as a *supersedeas*, and the same was approved by the Circuit Judge.

(Rec., pp. 138, 139.)

October 8, 1887, the writ of error was sued out by plaintiff in error and lodged with the clerk of the Circuit court for defendants in error.

(Rec., pp. 139, 140.)

October 8, 1887, the citation to defendants in error was issued.

(Rec., p. 140.)

October 13, 1887, the citation was served upon the attorney for the defendants in error.

(Rec., p. 141.)

October 20, 1887, a bill of exceptions covering exceptions taken by plaintiff in error upon the trial in the matter of admitting and excluding evidence was signed by the Circuit Judge.

(Rec., pp. 132, 133.)

BRIEF.

From the above statement it is clear that, whilst the judgment complained of by the plaintiff in error was rendered on the 28th of October, 1886, and the appeal bond was executed, approved and filed on December 6, 1886, yet no writ of error was "served," or even sued out "within sixty days, Sundays exclusive, after the rendering of the judgment complained of," as required by section 1,007 of the Revised Statutes, in order to make such writ of error a *supersedeas*. When the appeal bond was filed on December 6, 1886, no writ of error had been served, by lodging a copy thereof in the clerk's office. It was not even sued out until October 8, 1887, nearly a year thereafter. With the record now before the Court, showing the above state of facts, it is submitted that what this Court said by the late Mr. Chief Justice WAITE in *Kitchen* v. *Randolph*, 93 U. S. (3 Otto)—at page 92—is decisive of this motion:

"We are therefore of the opinion, that, under the law "as it now stands, the service of a writ of error, or the "perfection of an appeal within sixty days, Sundays ex- "clusive, after the rendering of the judgment or the pas- "sing of the decree complained of, is an indispensable "prerequisite to a *supersedeas*, and that it is not within "the power of a justice or judge of the appellate court "to grant a stay of process on the judgment or decree, "if this has not been done."

The decision of this Court, in the above cause, has not been

qualified in any subsequent case that I have been able to find, nor has the statute, applicable to this subject, been changed, so far as my examination has extended.

Therefore, to further elaborate the question, by citation of authorities, would be trespassing upon the time of the Court.

Respectfully submitted.

JNO. S. COOPER,

Attorney and Counsel for Defendants in Error.

Office Supreme Court U. S.
FILED.
APR 9 1888
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1887.

No. 1283.

THE WESTERN AIR LINE CONSTRUCTION COMPANY,
Plaintiff in Error,

vs.

WILLIAM A. McGILLIS AND JAMES HOGAN, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF McGILLIS & CO., WHO SUE FOR THE USE OF JOHN S. COOPER, TRUSTEE,
Defendants in Error.

ANSWER TO MOTION OF DEFENDANTS IN ERROR.

E. WALKER,
ATTORNEY FOR PLAINTIFF IN ERROR.

BARNARD & GUNTHORP, LAW PRINTERS, 84 & 86 LASALLE ST., CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1887.

No. 1283.

THE WESTERN AIR LINE CONSTRUCTION COMPANY,
Plaintiff in Error,

vs.

WILLIAM A. McGILLIS AND JAMES HOGAN, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF McGILLIS & CO., WHO SUE FOR THE USE OF JOHN S. COOPER, TRUSTEE,
Defendants in Error.

ANSWER TO MOTION OF DEFENDANTS IN ERROR.

The motion of the defendant in error is to vacate the *supersedeas* in the above cause, or for an order declaring that the appeal bond filed by appellant in said cause does not operate as a *supersedeas.*

On the 6th of May, A. D. 1886, the jury returned a verdict in favor of the plaintiffs for the sum of $24,165.57; the motion for new trial was overruled and judgment entered upon the verdict October 28, 1886. On the 6th day of December following the defendant appeared in open court and presented its bond in the penal sum of $30,000 with proper security, and also presented its bills of exception, and moved the court that said bond be approved, and that the bills of exception be signed and sealed for the purpose of perfecting the removal of said cause to this court for review. To this motion John S. Coop-

er, for whose use said cause was prosecuted, and who is also attorney of record for the defendant in error, appeared and asked for further time to consider the bills of exception, stipulating that no advantage should be taken by the defendants in error as to time. The bond is in the usual form of bonds that are to operate as a *supersedeas*, and recites that judgment was rendered, that the record in said cause had been filed in the office of the clerk of said court to reverse the judgment in the aforesaid suit, and that a citation directed to William A. McGillis and James Hogan for the use of John S. Cooper, trustee, had also been granted by the court. The bond was filed, but the other proceedings in said cause necessary to its removal were deferred at the request of the counsel for the defendant in error. The bond is recited in the transcript of record, page 138; and the facts connected with such proceedings are brought to the attention of the court by the affidavit of counsel for the plaintiff in error. Further proceedings in court were delayed at the request of the counsel for defendant in error until July, 1887, and then by further stipulation until the 20th of September following. Both bills of exception were signed by the judge of said Circuit court on the 20th day of October, A. D. 1887, and one filed at that date, and the other *nunc pro tunc* as of the 28th day of October, A. D. 1886, that being the date of entry of judgment. The Circuit court judge appended to the usual certificate October 20, 1887, a special certificate reciting a part of the facts that do not appear of record. (Transcript, page 132.) In this certificate it appears that the attorney for the defendant presented a bill of exceptions in said cause prior to the 20th of September, 1887, under the stipulation, also that the plaintiff's attorney was present and objected to such bill as presented, and further recites that the attorneys of record by stipulation had agreed from time to time for extension of time in which to file and present bills of

exceptions; that the plaintiff's attorney undertook to prepare and did predare a transcript of the plaintiff's evidence to be embodied in said bill of exceptions, and submitted the same to the attorney for the defendant on the 17th of September, 1887; that on the 20th of September and prior thereto the circuit judge was absent from the city, the court not being in session; that the bill was signed on the 11th of October in the absence of plaintiff's attorney, and that on the 13th by request of such attorney the circuit judge directed the clerk to defer preparing the transcript of record until the parties could be heard. On the 20th of October the parties appeared and agreed to the bill of exceptions, but plaintiff's attorney objected to the filing of the same. It is apparent from the record that the proceedings were delayed by stipulation, agreement and affidavit, and also by the absence of the judge, from the 6th of December, 1886, when the bond was filed, until the 20th of October, 1887. It is admitted that the bond filed was conditioned as in cases where the bond operates as a *supersedeas*, and the same was approved by the circuit judge, but it is insisted that the writ of error was not sued out in apt time, or within sixty days from the date of the judgment as required by statute, and that therefore such bond does not operate as a supersedeas.

Kitchen v. *Raulauf*, 93 U. S., page 86, is the only authority cited in support of the motion. In that case a decree foreclosing a mortgage was entered on the 6th of June, 1876, and for the sale of the property on the 2d of October following. No appeal from the decree or any part of it was prayed in the court below by any of the defendants, but on the 29th of September, 1876, the appellant filed his petition for an allowance of the appeal, and for a *supersedeas*, both of which were allowed on that day by the associate justice. Motion was made to vacate the order allowing the supersedeas. More than sixty days had elapsed after the entry of the final decree before the

bond was filed or the citation issued, and before the order for the *supersedeas* was entered. This court sustained the motion, holding that under the law as it then stood, that the service of a writ of error for the perfection of an appeal within sixty days, Sundays exclusive, after the rendering of the judgment was an indispensable prerequisite to the *supersedeas*. In this case nothing had been done by the appellant towards perfecting the removal of the cause to this court for review, until after the expiration of the statutory time, but in the case at bar, the bond was filed, and the necessary steps were taken by the plaintiff in error to perfect the removal of the cause within the time prescribed by law. The plaintiff in error was guilty of no default in the premises, but on the contrary the delay in filling the bills of exception, and suing out the writ of error, and the service of the citation, was at the request of the defendant in error, and for his accommodation, and in his interest. Section 1,000 of the Judiciary Act provides that every justice or judge signing a citation on any writ of error, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and if he fail to make his plea good, shall answer all damages and costs, where execution is to be stayed. The bond in this case recited that citation was issued, but it appears as a matter of fact that the citation with other necessary proceedings, was delayed at the request and under the stipulation of the defendants in error, and their counsel.

Tiernan v. *Booth*, 9th Bissell, 499, was an application for a writ of posession in execution of a judgment entered by the Circuit court of this circuit. Judgment was entered on the 13th day of December, 1879, but citation was not signed by the judge until the 4th day of September, A. D. 1880. The learned judge refused the motion and in his opinion says: "The practice in this circuit has usually been, upon the execu-

"tion and approval of a sufficient bond, and the issue of the "citation, to treat a writ of error as a supersedeas without any "express order of the court or judge. It is generally under- "stood between parties and by the court, that the bond that is "offered, being sufficient in amount, and the security adequate, "is intended and does operate as a supersedeas. If that is so "understood by the counsel and the court, no application is made "for an execution, or a writ of possession, as the case may be; "and therefore no order is generally entered in such cases."

After reciting the facts, the learned judge continues: "It will "be seen from this statement that if the plaintiff is entitled to a "writ of possession in this case, it will be in consequence of the "technicality of a citation not having been prepared and pre- "sented to the judge and signed within sixty days after the judg- "ment was entered. I do not feel inclined to sustain a techni- "cality of this kind under the facts of this case. * * * "It seems to me, for all practical purposes, the plaintiff having "been served with a citation before the October term of the "Supreme court, and notice thus being brought home to him of "the writ of error and of the term to which it was returnable, "and a bond having been executed, which was treated by the "court as a supersedeas bond, it is sufficient to entitle the de- "fendant to take the judgment of the Supreme court upon the "merits of the case itself, before the plaintiff can call on this "court for a writ of possession."

In meeting this motion of the defendant in error, we do not think a review of authorities at all necessary. The statutes and the rules of court must govern and control the rights of the parties, still we submit that the facts of each case should be considered by the court, especially such facts as will excuse a party from a strict compliance with the letter of the statute. It is a familiar rule that where a party has been guilty of no default, and is proceeding in good faith, a court will reluctantly

enter any order that will do the party an injustice. In the present case, however, if the position of the counsel for the defendant in error is correct, and if as a matter of law, the filing of the bond on the 6th day of December, 1886, and the suing out of the writ of error in October, 1887, did not *per se* operate as a supersedeas, then it follows that there is no *supersedeas* in this cause, and nothing in the motion of the defendant in error that the court can act upon. No order of supersedeas was entered by the Circuit court, and therefore there is no order of that court that should be vacated. It does not appear that the Circuit court has ever denied the writ of execution, or that any application whatever has been made to such court for relief, or that there is any occasion or necessity for the action of this court in the premises.

Goddard v. *Ordway*, 94 U. S., 672, was an application to this court for a writ in the nature of a restraining order upon the Circuit court, after appeal from the final decree, and after *supersedeas* had been perfected. It was held "that a *supersedeas* "is not obtained by virtue of any process issued by this court, "but it follows as a matter of law, from a compliance with the "provisions of the act of Congress in that behalf. We are not required, therefore, to issue any writ to perfect the right of the party to that which the law has given him." So in the case at bar, if it follows that the filing of the bond and the writ of error did not operate as a *supersedeas per se*, then the defendant in error may proceed to the collection of the judgment by proper writs, and if such action should be taken, the party should be remanded to the Circuit court for relief that may be necessary in the premises. The Circuit court is familiar with all the facts that should control the rights and the equities of the parties, and certainly with all the facts not incorporated in the present record, and it would therefore seem to be a reasonable and proper conclusion, that this court should not, in the considera-

tion of this motion, enter any order that should be considered as directory to the Circuit court. If the bond filed had been only security for costs, and not in proper form, or for proper amount to operate as a *supersedeas*, it would not be urged by counsel that it was necessary for this court to enter any order relative to the right of the defendant in error to an execution; that he could proceed with the collection of his judgment without asking any aid whatever of this court, unless the Circuit court should interfere with such collection. Therefore, if under the operation of the law, there is no *supersedeas* or stay of execution, and if there is no order of the Circuit court granting such stay, the motion of defendant in error is unnecessary, and should be denied.

The hopeless insolvency of the defendants in error is fully shown by the record—their evident purpose is to enforce payment of the judgment before hearing, and review the proceedings—if successful, a reversal would be of no possible value to the plaintiff in error.

E. WALKER,
Atty. for Plaintiff in Error.

CHICAGO, April 6, 1888.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1887.

No. 1283.

THE WESTERN AIR LINE CONSTRUCTION COMPANY,
Plaintiff in Error,

vs.

WILLIAM A. McGILLIS AND JAMES HOGAN, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF McGILLIS & CO., WHO SUE FOR THE USE OF JOHN S. COOPER, TRUSTEE,
Defendants in Error.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

EDWIN WALKER, being duly sworn, deposes and swears that he is attorney for the above named plaintiff in error and also in the trial of said cause in the Circuit court of the United States for the Northern district of Illinois.

The deponent further swears that judgment was entered in said cause against the defendant therein, on the 28th day of October, A. D. 1886, for the sum of twenty-four thousand, one hundred and sixty five and $\frac{57}{0}$ ($24,165.57) dollars, with costs, as appears from the transcript of record page 47; that on the 6th day of December, A. D. 1886, this deponent as attorney for said Western Air Line Construction Company, plaintiff in error, after due notice to John S. Cooper, attorney

for defendant in error, presented to the judge of said court the bond of plaintiff in error with good and sufficient security, to the effect that plaintiff in error should prosecute its writ to effect, and if it failed to make its plea good, should pay all damages and costs; and also at the same time presented a bill of exceptions to the charge of the court to the jury, which said bill appears on pages 133 to 138 in said transcript of record; and also at the same time presented another bill of exceptions of the evidence in said cause, and exceptions reserved during the progress of said trial and requested the court to approve said bond, and for writ of error and citation. The said deponent then intending, and so stated, that all the aforesaid proceedings should be substantially concurrent acts.

The deponent further swears that the said John S. Cooper appeared to said motion, and then stated that he had not had time to examine such bills of exception, and asked for further time for that purpose; and also stated in open court, and assured this deponent that no advantage or exceptions should thereafter be taken as to time, and that such delay should not prejudice the plaintiff in error's right to the removal of said cause to this court for review. And this deponent relying upon such statements, consented to the extension of time as requested by said attorney of the defendant in error; that thereupon said bond was approved by the court and duly filed, and said bills of exceptions were taken by the attorney of defendant in error for inspection.

The deponent further swears that said bills of exception were retained by said attorney until April, 1887, this deponent frequently calling upon said attorney for said bills, but upon each demand it was represented to this deponent that said bills had not been examined. Subsequently, and as the deponent believes, in the month of April, 1887, the said attorney for the defendant in error delivered to this deponent said bills of ex-

ception, and then stated that, on account of the pressure of business and the condition of his health, he had not been able to examine said bills; that he was then to leave for California, to be absent several weeks, but assured the deponent that, upon his return, said bills of exception should be considered, and again assured this deponent that no advantage would be taken by the defendant in error of the delay; that even if he should not return that he had left necessary instructions for agreeing upon the bills of exception and the preparation of the record for the consideration of this Court at its then next ensuing term.

This deponent further swears that, to the best of his recollection, said attorney did not return from his visit to California until early in the month of July, 1887, but the deponent says that, immediately after he had learned of such return, he called upon said attorney for the purpose of perfecting and fiilng said bills of exception; that on July 23, 1887, not having agreed with said attorney relative to certain matters contained in said bills of exception, and being about to leave the city for his summer vacation, he then entered into the written stipulation set forth on page 132 of the transcript, and that on said date the said Cooper agreed to prepare a bill of exceptions satisfactory to himself; that early in the month of September the bill of exceptions, as prepared by said attorney for the defendant in error, was presented to the court, but not being satisfactory, by direction of said court, the said Cooper prepared a further bill of exceptions and submitted it to this deponent on the 17th day of September, 1887; that further delay occurred for reasons appearing in the special certificate of the judge of said court, as appears upon page 132 of the transcript of record.

The dependent further swears that his delay in filing said bill of exceptions and suing out writ of error, was occasioned